STATE OF WISCONSIN

1999

Brownfields Study Group Final Report

RR-615

Table of Contents

Overview of Wisconsin's Brownfields Study **3**
Issues Summary **6**

Chapter 1 – Brownfields Incentives for Local Governments **13**

- Clarify Access and Inspection Authority for Local Units of Government (LUGs) 14
- Allow Transfer of Tax Delinquent Brownfields Properties to Cities 15
- Modify Expenditure Restraint Exception for Municipalities 16
- Strengthen Ability of Municipality to Recover Environmental Costs 17
- Clarify Blight Elimination and Slum Clearance Authority 19
- Modify LUGs' Negotiation and Cost Recovery Process 20
- Expand Protections for LUGs that Involuntarily Acquire Contaminated Property 22

Chapter 2 – Financial Incentives for Brownfields **30**

- Provide Permanent Funding Source for Brownfields Grant Program 32
- Increase Funding for the Brownfields Grant Program 33
- Provide Flexibility with Development Zone Tax Credits For Remediation 34
- Create New State-wide Brownfields Tax Credit for Remediation Costs 36
- Modify Wisconsin Housing and Economic Development Authority (WHEDA) Loan Guarantees 38
- Market Department of Transportation (DOT) Brownfields Funds 40
- Expand Eligible Activities of the Community Development Block Grant/Blight Elimination and Brownfields Redevelopment (CDBG-BEBR) Program 41
- Clarify Relationship of Brownfields and the Stewardship Program 43
- Modify DNR Land Recycling Loan Program 44
- Modify Environmental Remediation Tax Incremental Financing (ER TIF) District 47
- Provide Funding for Neighborhood Revitalization Brownfields Projects 50

Chapter 3 – Brownfields Liability Protections **54**

- Modify the Definition of "Voluntary Party" 55
- Identify Potential Sources of Funding to Cover Any Future Cleanup Costs Associated with Expanding the Eligibility of the Voluntary Party Process 57
- Clarify and Streamline Solid Waste Requirements to Facilitate Redevelopment 58
- Create Interim Liability Protections during the Voluntary Party Liability Exemption Process 62
- Expand the Voluntary Party Liability Exemption and the Liability Protections for Local Units of Government 64
- Ensure Availability of a Full Certificate of Completion for Properties Impacted with Off-site Groundwater Contamination 66
- Use of Natural Attenuation at Voluntary Party Sites 68

Chapter 4 – Brownfields Area-wide Groundwater Issues **70**

- Create Financial and Environmental Incentives for Cleaning up and Redeveloping Area-wide Brownfields Contamination 72

- Improve Information for Area-wide Environmental Characterization 77

- Provide Single State Agency Contact to Prepare Focus/Strategy for Environmental Cleanup of an Entire Area 79
- Use of Natural Attenuation in Area-wide Groundwater Approaches and Consideration of Groundwater Use in Conducting Cleanups 80
- Clarify Uncertainty Regarding Establishment of Cleanup Objectives 88

Chapter 5 – Brownfields Public Outreach and Education Initiatives 90

- Expand the Use of Geographical Information Systems (GIS) for Brownfields Redevelopment 91
- Promote Public Outreach and Education in Brownfields Redevelopment 93
- Promote Non-profits/Quasi-governmental Entities in Brownfields Redevelopment 94
- Expand the Development of Brownfields Case Studies 95
- Enhance Communication Between Government Entities Concerning Tax Delinquent Properties 96

Chapter 6 – Issues For Further Study 98

Appendices 100

- Appendix A – General Comments to Brownfields Study Group Report 100
- Appendix B – Chapter 1 Comments/Information 108
- Appendix C – Chapter 2 Comments/Information 111
- Appendix D – Chapter 4 Comments/Information 112
- Appendix E – Brownfields Study Group Membership 121
- Appendix F – Brownfields Study Group Subcommittee Memberships 124

Overview of Wisconsin's Brownfields Study

Purpose of Brownfields Study

The State of Wisconsin has made significant progress in creating incentives to clean up and redevelop brownfields properties. "Brownfields" are a category of properties which are abandoned, idle or underused industrial or commercial facilities or sites, where the expansion or redevelopment is adversely impacted by known or perceived environmental contamination. While Wisconsin has been a leader in the national effort to clean up and reuse these properties, it is also recognized that much work remains. In particular, there is a need to focus on improving Wisconsin's existing brownfields incentives and creating new incentives to address "gaps" in our current brownfields initiative.

As part of the 1997-99 State of Wisconsin biennial budget, the Legislature directed the Department of Natural Resources (DNR), in cooperation with other state agencies and external parties, to study seven issues related to the cleanup and reuse of brownfields. The culmination of this effort is the attached Brownfields Study Report, which synthesizes the Study Group's efforts s since April , 1998.

History of Brownfields Legislation in Wisconsin

At the national, state and local levels, the interest in cleaning up and returning brownfields to productive use has transformed this once environmental issue into a major public policy initiative. In the State of Wisconsin, there are an estimated 8,000 brownfields, of which 1,500 are believed to be tax delinquent. These properties present public health, economic, environmental and social challenges to the rural and urban communities in which they are located. The challenge to this state is to continue to improve our resources and incentives to revitalize these brownfields and thus our communities.

To date, there have been two major legislative initiatives in Wisconsin to deal with brownfields properties. The first set of brownfields initiatives was contained in the Wisconsin's **Land Recycling Law**, passed in May 1994. This law took the initial steps to clarify the liability of lenders, municipalities and purchasers of property who meet certain requirements. The next set of brownfields initiatives was passed as part of the state's 1997-99 biennial budget. These incentives built upon, and greatly expanded, the brownfields initiatives in the Land Recycling Law. Significant new initiatives in the area of financial assistance for brownfields were created, and existing programs were modified to be more favorable to brownfields. While Wisconsin became a national leader in the area of brownfields, some very real needs in Wisconsin communities have not been met.

Structure of Wisconsin's Brownfields Initiative

As a result of the two brownfields initiatives, several agencies have responsibility for implementing various brownfields components. The following table shows the state agencies' areas of expertise and the initiatives they administer.

State Agency	Natural Resources	Commerce	Transportation	Revenue	Administration — WHEDA
Primary Area of Expertise relating to brownfields	Financial, Redevelopment and Technical Assistance	Economic revitalization of brownfields	Cleanup of brownfields related to transportation projects and infrastructure planning	Tracking of tax credits and other tax incentives for brownfields	Providing business assistance
Programs Administered	Redevelopment and Technical <u>Assistance</u> -off-site letters -close out letters -lease letters -technical comments -certificates of completion Municipal <u>Assessments</u> -tax delinquent or bankrupt properties Land Recycling Loan Program Stewardship Program	Brownfields Grants Development Zone Remediation Tax Credits CDBG Blight Elimination and Brownfields Redevelop-ment grants Petroleum Environ-mental Cleanup Fund Award (PECFA) Brownfields Internet GIS	Transportation Economic Assistance (TEA) TEA 21 infra-structure assistance State Infrastructure Bank (SIB)	Environmental Remediation Tax Incremental Financing (ER TIF)	Brownfields Loan Guarantee

<u>Brownfields Study Group Membership</u>

As part of the 1997-99 biennial budget, the state Legislature requested that a study be done relating to a number of brownfields issues. In particular, the Legislature directed the Department of Nature Resources (DNR) to prepare a brownfields report in cooperation with the following state agencies:

- Department of Administration (DOA)
- Department of Commerce (Commerce)
- Department of Revenue (DOR)
- Department of Transportation (DOT)
- Department of Agriculture, Trade and Consumer Protection (DATCP)
- Department of Health and Family Services (DHFS)

In addition to these state agencies, the Department of Health and Family Services was invited to participate in the Study Group, given its involvement with public health issues at contaminated properties. The DNR also extended Brownfields Study Group membership to other external

parties, such as local governments, businesses, environmental attorneys and consultants, environmental groups and other persons with a historic interest in this topic. A listing of the Brownfields Study Group members can be found in Appendix E of this report.

Brownfields Study Group Responsibilities

The Legislature provided the Study Group with seven basic items that it was to study and provide recommendations on by January 1, 1999. The seven items that were to be studied are:

1. **Study the means by which this state can increase the number of brownfields that are cleaned up and returned to productive use.**

2. **Study the potential methods to provide long-term funding of brownfields financial assistance programs.**

3. **Study optional methods to clean up groundwater on a comprehensive, rather than property-by-property.**

4. **Study the effectiveness of existing laws concerning the redevelopment of brownfields.**

5. **Study the definition of "voluntary party" under section 292.15(1)(f) of the statutes.**

6. **Identify and evaluate additional legislative proposals to further the cleanup and redevelopment of brownfields.**

7. **Identify potential sources of funding for brownfields cleanups for which this state becomes responsible because of the expansion of section 292.15 of the statutes, to cover persons who did not intentionally or recklessly cause the release of a hazardous substance discharge.**

Identifying Issues and Recommending Solutions

The Brownfields Study Group has been meeting since April 1998 to further refine and study those seven legislative items relating to brownfields. Due to the wide array of issues identified, the group formed five subcommittees:

- Area-wide Groundwater Contamination
- Financial Incentives
- Liability Issues, including Voluntary Parties
- Local Government Unit Financial Incentives and Liability Clarifications
- Public Outreach and Education

Five external parties were selected to chair each subcommittee, with a member of a state agency providing support to each subcommittee. The subcommittees met numerous times over the course of the summer and early fall, to identify and provide initial recommendations to the full Brownfields Study Group. The Study Group convened in November and December to discuss and arrive at a conclusion on the proposals contained in this report. Throughout the nine-month process, information was shared through the DNR's web page and electronic transfer mechanisms, to all Study Group members and other interested parties. All meetings were open to the public. Many people participated in the meetings, even though they were not formal members of the Study Group. The listing of those individuals is found in the Appendix F.

The culmination of the Brownfields Study Group's efforts can be found in this report. There are over 30 issues that were identified by the Brownfields Study Group, as well as more than 70 proposals to resolve those issues. Many of these proposals involve making relatively routine changes to state laws. Other proposals, due to their comprehensive nature, may take several months to resolve, such as the proposal to address area-wide groundwater contamination or proposals to streamline the state's solid waste requirements.

Regardless, the Study Group believes it is important for the Legislature to have this comprehensive list of brownfields issues and recommendations. The Study Group feels this list of recommendations is critical to moving Wisconsin one step closer to solving the brownfields cleanup and redevelopment puzzle.

ISSUES SUMMARY

Chapter 1 – Brownfields Incentives for Local Governments

Issue: Clarify Access and Inspection Authority for Local Units of Government (LUGs)
The Study Group proposes to clarify local government's authority to inspect brownfields under the Blight Elimination and Slum Clearance law. In addition, community and redevelopment authorities should be eligible to use "special inspection warrant authority."

Issue: Allow Transfer of Tax Delinquent Brownfields Properties to Cities
The Study Group proposes that Section 1. 75.197 of the state statutes be amended to allow local municipalities to obtain tax delinquent brownfields properties that the county does not take a tax deed to within two years after the tax certificate has expired. This will allow local municipalities to speed up the process of obtaining and redeveloping brownfields sites.

Issue: Modify Expenditure Restraint Exception for Municipalities
The Study Group proposes that the state statutes be amended so unpaid property taxes and special assessments on brownfields properties not count against the spending cap for municipalities.

Issue: Strengthen Ability of Municipality to Recover Environmental Costs
The Study Group proposes to create new statutory language to provide local governments a clear tool to recover monies spent on investigating and remediating brownfields property from a parties who either caused the contamination, or should have taken action to clear up the property prior to the local government acquiring the property.

Issue: Clarify Blight Elimination and Slum Clearance Authority
The Blight Area Law and the Blight Elimination and Slum Clearance Act should be amended to specifically include "environmental pollution" in the definition of blighted area and blighted property. Also, it should be made clear that a municipality or redevelopment authority has the right to make environmental inspections of properties (please see Appendix B for suggested statutory language).

Issue: Modify LUGs' Negotiation and Cost Recovery Process
The Study Group proposes to modify s.292.35 Wis. Stats. which allows local governments to negotiate with responsible parties to clean up environmental pollution.

Issue: Expand Protections for LUGs that Involuntarily Acquire Contaminated Property

The Study Group made the following proposals to expand LUGs liability protections:

- allow LUGs that acquire brownfields property using Stewardship monies to receive liability protection;
- allow LUGs certain exemptions under the state hazardous waste authority to allow quicker cleanups of brownfields sites with these types of contamination;
- clarify LUGs flexibility in removing Underground Storage Tanks (USTs);
- remove requirement for LUGs to investigate and cleanup federally defined USTs; and
- expand the definition of LUGs to include Community Development Authorities.

Chapter 2 – Financial Incentives for Brownfields

Issue: Provide Permanent Funding Source for the Brownfields Grants Program

The Study Group investigated possible funding sources and determined that continuing to use money from the Environmental Fund by repealing the sunset on the vehicle environmental fee would be the most favorable alternative.

Issue: Increase Funding for the Brownfields Grants Program

The Study Group recommends an increase in funding per fiscal year from the current $5 million to $15 million. The Brownfields Grant Program was created in the 1997-99 Biennial Budget and the demand for funds was four times what was available for the first two funding cycles. For the first two funding cycles, 81 applicants requested $40 million and only $10 million was available for awards.

Issue: Provide Flexibility with Development Zone Tax Credits for Remediation

The Study Group proposes to allow more flexibility within the existing Development Zone remediation tax credits by: allowing LUGs and non-profits to sell and transfer remediation tax credits for the purpose of paying for remediation costs and attracting end users to projects; and, allowing businesses to sell or transfer tax credits as well.

Issue: Create New State-wide Brownfields Tax Credit for Remediation Costs

The Study Group proposes to make brownfields remediation tax credits available throughout the state on a controlled basis to enhance the economic feasibility of all brownfields projects and promote more voluntary cleanups.

Issue: Modify Wisconsin Housing and Economic Development (WHEDA) Loan Guarantees

To improve the WHEDA Brownfields Loan Guarantee, the Study Group proposes that businesses should be able to offer collateral other than property as a security interest, and to permit WHEDA to buy down the interest rate.

Issue: Market Department of Transportation (DOT) Brownfields Funds

The Study Group proposes that four DOT programs – the General Infrastructure Assistance, Transportation Enhancement (TEA 21), Transportation Economic Assistance (TEA), and State Infrastructure Bank (SIB) programs – be more aggressively marketed for brownfields projects. Secondly, the Group proposes that funding cycles occur on a yearly basis.

Issue: Expand Eligible Activities of the Community Development Block Grant/ Blight Elimination and Brownfields Remediation (CDBG-BEBR) Program

The Study Group proposes that the CDBG-BEBR program be expanded to fund redevelopment planning and projects that have a taxable value end use.

Issue: Clarify Relationship of Brownfields and the Stewardship Program

The Study Group proposes that the DNR carryout administrative reforms to clarify the relationship of brownfields to the Stewardship program.

Issue: Modify DNR Land Recycling Loan Program

The Study Group proposes amending the DNR's Municipal Land Recycling Loan Program to make it more attractive to municipalities including streamlining the application and awards process, reducing the interest rate and allowing loans to be used to conduct site investigations and Phase I and II environmental assessments.

Issue: Modify Environmental Remediation Tax Incremental Financing (ER TIF) District

The Study Group makes several proposals regarding Environmental Remediation Tax Incremental Financing Districts (ER TIFs), including expanding the definitions of "eligible costs" and "period of certification;" allowing a local government to create an ER TIF regardless of whether or not it owns the property; and creating new authority to allow ER TIFs in DNR-approved "Sustainable Urban Development Zone."

Issue: Provide Funding for Neighborhood Revitalization Brownfields Projects

The Study Group proposes to create a new grant program for local governments for two types of brownfields projects. The first is intended to "jump start" brownfields redevelopment and the second is intended for investigation and cleanup for projects with indirect economic benefits that are unlikely to receive other state brownfields grants or reimbursements.

Chapter 3 – Brownfields Liability Protections

Issue: Modify the Definition of "Voluntary Party"

The Study Group proposes that the "reckless" and "intentional" provisions contained within the DNR's Voluntary Party Liability Exemption (VPLE) process be removed. The Group concluded that these definitions created needless and costly delays, and anyone who thoroughly investigates and remedies contaminated property should be eligible to obtain the liability exemption and move forward with redevelopment.

Issue: Identify Potential Sources of Funding to Cover Any Future Cleanup Costs Associated with Expanding the Eligibility of the Voluntary Party Process

The Study Group proposes that the DNR prepare a status report in conjunction with its biannual budget submittal that describes the status of the sites that have participated in the Voluntary Party Liability Exemption process.

Issue: Clarify and Streamline Solid Waste Requirements to Facilitate Redevelopment

The Group also proposes that the DNR Remediation & Redevelopment and Waste Management programs work with internal and external parties to improve their coordination on redevelopment of brownfields sites.

Issue: Create Interim Liability Protections during the Voluntary Party Liability Exemption Process

The Study Group proposes that the VPLE process should be modified to expressly provide interim liability protection for qualified parties where the DNR has approved a site investigation and those parties have agreed to implement a remediation approved by the Department.

Issue: Expand the Voluntary Party Liability Exemption and the Liability Protections for Local Units of Government

To encourage more parties to clean up and redevelop brownfields, the Study Group proposes that the liability exemption provided in s. 292.15 to Voluntary Parties and the exemption in s. 292.11(9)(e) for Local Units of Government be extended to any properties impacted by the property that currently receive the liability exemption. Also, the Study Group proposes to expand the civil immunity protection provided in s. 292.26.

Issue: Ensure Availability of a Full Certificate of Completion for Properties Impacted with Off-site Groundwater Contamination

The Study Group believes that a full certificate of completion, as opposed to a partial certificate and an off-site exemption, provides a more valuable incentive to encourage parties to purchase and redevelop brownfields. The Group proposes that Section 292.15, Wis. Stats., should be amended to allow the DNR to issue full certificates of completion at sites with contamination coming from off-site.

Issue: Use of Natural Attenuation at Voluntary Party Sites

The Study Group proposes that s.292.15, Wis. Stats. be amended to allow Certificates of Completion to be issued *before* groundwater standards are met at sites where natural attenuation is used as a final remedy. In order to receive a Certificate of Completion before groundwater standards are met, the voluntary party would be required to obtain insurance that would cover the costs of remediation in the event that the natural attenuation remedy fails. The DNR will work with the Department of Administration and interested parties to develop rules that specify the type of insurance that would be most feasible.

Chapter 4 – Brownfields Area-wide Groundwater Issues

Issue: Create Financial and Environmental Incentives for Cleaning Up and Redeveloping Area-wide Brownfields Contamination

The Study Group proposes the creation of a Sustainable Urban Development Zone (SUDZ) Program, which would create financial incentives to promote clean up and redevelopment of certain blighted areas in a community, rather than a specific property. The Group also proposes

specific criteria for establishing the SUDZ, funding for assessments and clean up of properties in a SUDZ, and community education components.

Issue: Improve Information for Area-wide Environmental Characterization

The Study Group proposes the creation of a comprehensive bibliography of available information on an geographic basis that identifies all sources of general and site specific groundwater information.

The Study Group also proposes to work with existing and newly-created GIS initiatives (such as the Department of Commerce's Brownfields Internet GIS) to include physical and chemical groundwater and soil data in those databases, and that the state provide additional funding/staffing for the DNR's Bureau of Drinking Water and Groundwater for cooperation/coordination with existing GIS efforts.

Issue: Provide Single State Agency Contact to Prepare Focus/Strategy for Environmental Cleanup of an Entire Area

The Study Group proposes that a single point of contact should be assigned by the lead agency to manage the project. This individual could either act as the project manager, in the case of an area-wide project with a limited scope, or as a project coordinator in cases where the project is much larger in scope, straddles DNR geographic assignments, or involves the review of other programs.

Issue: Use of Natural Attenuation in Area-wide Groundwater Approaches and Consideration of Groundwater Use in Conducting Cleanups

The Study Group makes two proposals, one that requires the DNR to allow the use of institutional controls – rather than require a groundwater use restriction – to provide notice to the public, and a second proposal that suggests the DNR use multiple approaches in considering groundwater use in conducting cleanups of brownfields properties

Issue: Clarify Uncertainty Regarding Establishment of Cleanup Objectives

The Study Group proposes that the DNR enhance its outreach efforts to clarify the existing statutes, codes, guidance and practical application regarding cleanup requirements and standards. This effort should be coordinated with existing internal and external advisory groups and affected parties and should include examples of actual case histories from past and future sites, including clarification of how the risk-based corrective action (RBCA) process is applied to brownfields in Wisconsin.

Chapter 5 – Brownfields Public Outreach and Education Initiatives

Issue: Expand the Use of Geographical Information Systems (GIS) for Brownfields Redevelopment

The Study Group proposes that the existing Wisconsin Land Council, or a comparable entity, in cooperation with the Council's Technical Working Group, be given the responsibility of establishing protocols for implementing a coordinated GIS effort among all the state agencies,

including those focused on GIS brownfields. The group also proposes creating a pilot study to test if the GIS proposals and processes work.

The Study Group also proposes that the state begin a process of converting from reporting via paper documents to mandatory electronic submissions in a standardized electronic format. First priority should be given to environmental and infrastructure data and to integrating existing electronic databases.

Issue: Promote Public Outreach and Education in Brownfields Redevelopment

The Study Group proposes the creation of a single interagency brownfields web site, linking brownfields resources at each agency and regional/local links. The group supports the concept of a one-stop shop for brownfields information, and recommends an interagency communication plan between all agencies to assure that each agency is providing brownfields related information to a central clearinghouse of information.

The group also proposes:

- that the existing Memorandum of Understanding (MOU) between DOA, DNR and DOC provide for the dissemination of information through several media, including printed materials, a telephone hot line, fax, email and referral to the brownfields web site;
- that outreach materials include but not be limited to information on the environmental, social, economic, and health impacts of brownfields redevelopment; and
- that a standing outreach committee be established to create a communication package for brownfields redevelopment and community outreach.

Issue: Promote Non-profits/Quasi-governmental Entities in Brownfields Redevelopment

The group recommends providing support for an existing or, if necessary, a new non-profit or academic entity to bridge the gap between existing resources and the need for additional capacity building.

This organization would be an independent entity, governed by a multi-disciplinary steering committee, and provide specific professional services to build existing capacity for brownfields development, to advocate for brownfields redevelopment on behalf of the public interest, and if appropriate, to engage in direct acquisition and redevelopment of brownfields properties.

The group also proposes that the state Legislature expand the liability exemption of non-profits to include programs/projects that have more than an economic basis – for example, land re-use to create parks and forests.

Issue: Expand the Development of Brownfields Case Studies

The Study Group recommends that a systematic study be undertaken to quantify the expected costs and returns of redeveloping an environmentally problematic property as well as a greenfields development. The study could be conducted in, encompassing or adjacent to a federally designated enterprise zone or state designated development zone.

The study should also be conducted through an academic facility with existing capacity to support a study in urban land economics and the private sector real estate market, and that parties

receiving state brownfields funding be required to make information available, on a confidential basis if appropriate, to support the study.

Issue: Enhance Communication between Government Entities Concerning Tax Delinquent Properties

The Study Group proposes that state entities, counties, local governments and state tax assessors formalize improve communication and modify assessment policies regarding tax delinquent brownfields properties.

Chapter 6 –Issues For Further Study

The Brownfields Study Group discussed a number of additional topics, but did not make recommendations to address the issues. Some of these issues were beyond the scope of the Study Group and others, while the group felt they were important, would require too much time to analyze thoroughly.

Chapter 1 – Brownfields Incentives for LOCAL GOVERNMENTS

Wisconsin recognizes that local governments are key to ensuring that brownfields properties are returned to productive use in a safe manner. While the private sector will clean up and redevelop the economically viable brownfields properties, the public sector – particularly local governments – face the challenge of revitalizing properties the private sector has no present interest in.

Wisconsin local governments need brownfields redevelopment tools that can leverage as many local, state, federal and private resources as possible. In general, the Brownfields Study Group focused on creating brownfields incentives to:

- **Further clarify a local government's liability for a brownfields property.**
- **Enhance existing programs or create new tools to clean up a property.**
- **Gain access to certain brownfields properties.**

Some of the changes in this report represent minor modifications to existing laws that would make a local government's job easier. Other proposals represent more radical changes to Wisconsin laws or programs. The Study Group felt both types of changes were necessary for this state to continue its reputation as a national leader in the area of brownfields redevelopment.

Incentives proposed in this Chapter:

- ➢ **Clarify Access and Inspection Authority**
- ➢ **Allow Transfer of Tax Delinquent Properties**
- ➢ **Modify Expenditure Restraint Exception**
- ➢ **Strengthen Ability to Recover Environmental Costs**
- ➢ **Clarify Blight Elimination and Slum Clearance Authority**
- ➢ **Modify Negotiation and Cost Recovery Process**
- ➢ **Expand Protection for Involuntary Acquisition of Properties**

Issue: Clarify Access and Inspection Authority for Local Units of Government (LUGs)

Background

In Wisconsin, local units of government have limited and sometimes unclear authority to enter and inspect real properties to determine the nature and extent of environmental pollution. Many of these properties cause or add to blight problems within communities and can, in some cases, pose a public health threat. In 1994, the state provided counties and the City of Milwaukee authority to inspect real property where a tax certificate has been issued. Other states have recognized the need to provide its local units of government more authority to inspect brownfields properties. Just recently, the State of Illinois passed broad legislation to allow municipalities more authority to inspect brownfields properties.

Proposal

- **Clarify Authority to Inspect under Blight Elimination and Slum Clearance.** Please see specific proposals under the issue "Clarify Blight Elimination and Slum Clearance Authority" in this chapter.

- **Special Inspection Warrant Authority:**
  - In the special inspection warrant authority in s.66.122, Wis. Stats., include Community and Redevelopment authorities (CDAs and RDAs) as eligible to use the special inspection warrant authority.
  - Modify other sections of the statute to clarify the powers and duties of RDAs and CDAs (e.g., s.66.431(5), Wis. Stats.).

Comments

The Study Group felt that, under the Special Inspection Warrant Authority, there was concern over giving too much authority to CDAs and RDAs. The group also felt that municipalities have the authority to get special warrants and should do so on behalf of CDAs/RDAs.

This Authority is intended to be an exception to the requirement of finding probable cause to issue a search warrant. It is meant to allow units of government to conduct routine inspections for the purpose of protecting public health, welfare or safety or the environment and should be used only when necessary. Federal and state case law upholds the constitutionality of special inspection warrants for limited purposes, so the authority to issue them should remain with the municipality.

Wisconsin Manufacturers and Commerce (WMC) Comments: WMC opposes expansion of local governments' authority to access and inspect property. It is unclear why this additional authority is needed.

Type of Change: Statutory
Resources: None

Issue: Allow Transfer of Tax Delinquent Brownfields Properties to Cities

Background

While significant progress has been made over the last five years, many Wisconsin counties are still reluctant to take title to tax delinquent properties. Many cities in those "reluctant" counties would like to take a proactive approach to dealing with these tax delinquent brownfields properties. However, for a city to enjoy the protections of the Spill Law's exemption from investigating and cleaning up the property, they must acquire the property in certain limited ways. One of those means of acquisition is through tax delinquency proceedings, which requires the county to first acquire the property. Proactive cities are having difficulty getting some county governments to take title to a tax delinquent property, so it can be passed to the city.

Proposal

Section 1. 75.197 of the statutes is created to read:

If a county does not take a tax deed to property that is subject to a tax certificate and that, as shown by an environmental assessment or similar information, is contaminated by a hazardous substance as defined in s.292.01(5), Wis. Stats., within two years after the issuance of a tax certificate, and upon written request of the municipality within whose jurisdiction the property is located, the county shall take a tax deed to the property and shall transfer ownership of the property or retain ownership and commence action within 180 days of the request. The county shall transfer ownership of the property to the municipality within nine months after receiving the written request from the municipality.

Comments

Type of Change: Statutory
Resources: None

Issue: Modify Expenditure Restraint Exception for Municipalities

Background

Municipalities that acquire properties from a county through tax delinquency proceedings are often required to monetarily compensate the county for a portion of the delinquent taxes. The monies the municipality pays the county for the property counts against their expenditure restraint authority. As such, the expenditure restraint cap can be a disincentive to a municipality interested in taking a brownfields property.

Proposal

Modify the following statute to read:

AN ACT to amend 79.05(2)(c); and to create 79.05(7) of the statutes; relating to: certain amounts paid for tax delinquent contaminated land not counted for purposes of expenditure restraint program.

Section 1. 79.05(2)(c) of the statutes is amended to read:

79.05(2)(c) Its municipal budget, exclusive of principal and interest on long-term debt and amounts under sub. (7), for the year of the statement under s.79.015 Wis. Stats. increased over its municipal budget as adjusted under sub. (6), exclusive of principal and interest on long-term debt and amounts under sub. (7), for the year before that year by less than the sum of the inflation factor and the valuation factor, rounded to the nearest 0.10%.

Section 2. 79.05(7) of the statutes is created to read:

79.05(7) Any amount representing unpaid real property taxes and special assessments that is paid by a municipality to purchase property that is contaminated by a hazardous substance as defined in s.292.01(5) and that is either subject to a tax certificate issued under s.74.57 or that is property for which a county has taken a deed under Ch. 75 is not included in the municipality's budget for purposes of sub. (2).

Comments

WMC's Comments: WMC opposes exceptions to the Expenditure Restraint Program. As exceptions are granted to this program, the program soon becomes meaningless.

Type of Change: Statutory
Resources: None

Issue: Strengthen Ability of Municipality to Recover Environmental Costs

Background

In Wisconsin, the state estimates that there are 8,000 brownfields properties that require some degree of investigation and cleanup. The state has actively promoted the critical role that local governments must play in their own communities if these properties are to be returned to productive use. While grants and loans are available for many projects, state and federal brownfields funds will not come close to covering the costs local governments will need to invest in cleaning up these properties. Thus, it is recognized that local governments need a clear tool to recover the monies spent on investigating and remediating brownfields properties, especially from a financially viable party that either caused the contamination, or should have taken action to clean up the property prior to the local government acquiring the property.

Proposal

Create s.292.12 of the statutes to read:

292.12 Remediated property; municipal cause of action.

(1) CAUSE OF ACTION. A local unit of government, as defined in s.292.11(9)(e)1. may initiate a civil action to recover damages from one or more persons responsible under sub.(2), for environmental remediation activities for property acquired in any of the ways identified in s.292.11(9)(e)1m.

(2) PERSONS RESPONSIBLE. The action under sub. (1) may be initiated against one or more of the following persons:
   (a) A person who, at the time the property is acquired by the local unit of government, possesses or controls the hazardous substance that was discharged on the property; and
   (b) A person who causes or caused the discharge of a hazardous substance on the property.

(3) DAMAGES.
   (a) The damages recoverable in an action initiated under this section are the reasonable and necessary costs incurred by the local unit of government for its environmental response activities for a property or portions of a property not previously the subject of a cleanup approved by the DNR, the Department of Commerce or the Department of Agriculture, Trade and Consumer Protection, considering the intended development and use of the property. Costs shall include administrative and legal expenses related to the remediation activities. Certification of costs shall be prima facie evidence that such costs are reasonable and necessary.
   (b) Damages shall be reduced by the fair market value of the property after completion of the remediation activities.

(4) FEDERAL AND STATE ASSISTANCE.

(a) Damages shall not be reduced by the amount of any federal or state monies under this section. The local unit of government shall reimburse to the state any state grant funds recovered under this section and any other state funds expended regarding the property after deducting reasonable costs for collection.

(b) Any expenditures made by the DNR under s.292.11 or 292.31(1), (3) or (7) shall constitute a lien on the property, superior to other liens, as provided in s.292.81, and superior to damages under par. (a).

(5) COURT COSTS. The local unit of government upon a recovery under this section shall be entitled to costs, disbursements and expenses of the action, necessary to prepare for or participate in actual or anticipated court proceedings.

(6) LIMITATION OF ACTION. An action under this section shall be commenced within six (6) years after the date of completion of environmental remediation activities for the property by the local unit of government.

Comments

DNR Comments:

- may want to clarify that if there is a state-approved cleanup based on one type of land use (e.g., industrial), a local government cannot recover environmental costs for cleaning up to a more restrictive standard (e.g., residential cleanup levels);
- may want to require that a local government must conduct environmental response activities in accordance with applicable state and federal environmental laws; and
- may want to expand authority to recover costs of addressing solid wastes, in addition to the proposed ability to recover costs of addressing hazardous substances.

WMC's Comments: WMC opposes the proposed municipal cost recovery provision that is proposed. We do not support creating a cause of action that is only available to municipalities, and we also have issues with the specific language proposed.

Bruce Keyes, Foley and Lardner, Brownfields Study Group Member, Comments: I believe that the same cause of action proposed for the municipality should be available to private parties, such that a cleanup by the municipality serves only as a last resort when the private sector fails.

Type of Change: Statutory
Resources: None

Issue: Clarify Blight Elimination and Slum Clearance Authority

Background

In 1997, the Legislature provided local units of government an exemption from the hazardous substance spill law, s.292.11 Wis. Stats., if they acquired a property through slum clearance or blight elimination. The state was following the lead of the U.S. Environmental Protection Agency (EPA) and the Department of Housing and Urban Development (HUD) in providing local governments both more authority and protection for dealing with blighted brownfields properties. While the Spill Law was clarified, many feel it is necessary to make a "technical clarification" (i.e. cross reference) to the state's slum clearance and blight elimination authorities with respect to environmental pollution.

Proposal

The Blight Area Law and the Blight Elimination and Slum Clearance Act should be "technically clarified" to specifically include "environmental pollution" in the definition of blighted area and blighted property. Also, it should be made clear that a municipality or redevelopment authority has the right to make environmental inspections of properties in blighted areas or of properties determined to be blighted. Due to the length of the suggested statutory changes, this language is listed in Appendix B.

Comments

WMC's Comments: WMC opposes the expanded inspection authority contained in this proposal.

The City of Milwaukee's comments for this issue are found in Appendix A.

Type of Change: Statutory
Resources: None

Issue: Modify LUGs' Negotiation and Cost Recovery Process

Background

In 1994, the Legislature created a new procedure in s.292.35, Wis. Stats. to allow local governments to negotiate with parties responsible for the clean up of environmental pollution. The goal of this process is to allow those parties to share the costs of, or cooperate in, cleanup on contaminated land owned by the local government unit. This process can be used at properties the local governments own, including landfills. While this process may be a tool for some communities to encourage responsible parties to pay their portion of the environmental costs, it has not been widely used for a number of reasons identified by the Brownfields Study Group.

In addition, the proposal in this report to create a Wisconsin Sustainable Urban Development Zone (SUDZ) program incorporates the use of the negotiation and cost recovery process as part of the tools available to clean up area-wide contamination (please refer to Chapter 4 for more details). It is envisioned that a local government unit could use a modified version of the current law to negotiate with responsible parties to share the costs and cooperate in the long-term cleanup of the groundwater. This may be an added incentive to motivate the responsible parties to clean up, since the cost of a party's share of the cleanup is based on the proportion of environmental pollution that was contributed.

Proposals

The following proposals are made to improve this process:

- The requirement that all parties be served pursuant to the service statute presents a substantial cost to the municipality in a typical municipal landfill involving hundreds of parties. This cost runs into several thousands of dollars and, from the city's perspective, is a waste of money. Recommend that a more efficient method of accomplishing this notice replace this section of the statute.

- The liability part of the statute – s.292.35(9) (CM) the "common scheme or plan" language – does not seem to be adopted from any other environmental laws. In fact, in researching of common scheme or plan, it is referenced chiefly in federal criminal statutes and has little, if anything, to do with any civil cases. It is submitted that the purpose of the statute is to establish liability where "corporate shield" arguments, deaths, transfers or asset sales, would be used as defenses. Broad language, making parties responsible where they continue the same product line, purchase a going business, maintain the same customers and utilize the same individuals as customers, is probably what was intended by the statute. This should be more clearly set out.

- With respect to s.(2g), Wis. Stats., concerning the identification of responsible parties, two issues need clarification. First, there should be a certain time for responsible parties to provide information back to the local government. Second, there should be a provision that makes transporters, haulers or other parties who have documents, but fail to voluntarily produce them by a set time, liable for that share. Changes in the statute similar to certain Superfund court rulings would be appropriate.

- Related to the issue above is the problem that arises when documents produced or discovered well into the process result in the identification of additional parties or greatly increase the number of parties. The question exists if due process is afforded those parties, who because of newly discovered documents: (1) have a significantly higher allocation; or (2) are first given an allocation late in the process, following the discovery of additional documents and after the hearings have been held concerning the remedy. The counter-side of that argument is that if the Court would let those parties out because they had no opportunity to comment on the remedy, etc., this would result in a harsh forfeiture to the municipality results. The statute needs to be modified to provide local governments with a clear way to fairly and equitably handle "late" information, yet proceed with the negotiation process.

- There is no requirement that, prior to going to the umpire, parties be required to state the basis of their objection and the allocation. The municipality is left, therefore, conjecturing whether or not a valid objection actually exists for going to the umpire. The right to go to the umpire should include the requirement of specifically setting forth the basis on which umpire review is sought. The City can then be prepared.

- In reviewing the names of potential umpires, it was obvious that many of them have little or no experience in environmental law and little or no experience in mediation and/or environmental litigation. It is submitted that the umpire list be carefully culled so it contains environmental experts who have been involved in significant allocation issues or remediations.

- There is no set time frame for parties to comment on the remedy. Parties seeking to alter or make significant comments on the remedy should be given a definite time frame, after which they are stopped from submitting any comments on the remedy or the approach to the remedy.

Comments

WMC's Comments: WMC agrees that the negotiation process contained in s.292.35 of the Wisconsin Statutes needs to be modified. However, we believe that the changes proposed need to be further discussed to ensure any negotiation process is acceptable to potentially responsible parties, as well as to local units of government.

Type of Change: Statutory and Administrative
Resources: None

Issue: Expand Protections for LUGs that Involuntarily Acquire Contaminated Property

Background

In 1994, the Legislature provided limited exemptions from the state's Hazardous Substance Spill Law (see s.292.11(9)(e), Wis. Stats.) to municipalities that acquire property through bankruptcy or tax delinquency proceedings. These types of municipal acquisitions are often referred to as "involuntary" acquisitions – where the government's interest in the property exists only because the actions of a non-governmental party give rise to the government's right to control or take title to a property.

The state Legislature determined that municipalities would not have to investigate or clean up the property in these situations, as generally required by the Spill Law.

The Legislature expanded the list of "involuntary acquisitions" eligible for the Spill Law exemption to include: condemnation, slum clearance, and blight elimination. In addition, the definition of who is eligible to take advantage of the exemption was expanded to include "local units of government (LUGs)" – municipalities, redevelopment authorities, public bodies designated under s.66.431, Wis. Stats., and housing authorities.

Proposals

With respect to the liability exemption for local units of government, the Study Group identified five issues which represent challenges to local units of government acquiring and reusing brownfields. These five challenges are:

- acquisition of brownfields property using Stewardship funds;
- clarification of state and federal hazardous waste authority;
- requirements to remove underground storage tanks;
- requirements to conduct cleanup of federally-defined underground storage tanks; and
- definition of local units of government.

The issues are further described on the following pages, as well as the Study Group's proposals for dealing with these issues.

1. LUGs: Acquisition of brownfields property using Stewardship funds

Background

Many brownfields properties are located along river or lake fronts, due to the historic reliance of industry on ready sources of surface waters. Thus, many municipalities have discovered that the revitalization of their waterfronts may involve the acquisition and cleanup of contaminated properties. The Stewardship Program was modified in 1997 to give "greater weight" to projects involving brownfields.

In particular, nonprofit conservation organizations and local governments may be eligible to apply under the urban green space, urban river restoration, or trail acquisition categories for grants to acquire brownfields properties.

Many local units of government applying for Stewardship funds would like to take advantage of the Spill Law's protections for involuntary acquisition, particularly for acquiring the property through condemnation. However, the Stewardship program is legally prohibited from granting funds if the property is acquired through condemnation.

Proposal

Modify s.292.11(9)(e) , Wis. Stats., to include an exemption for local units of government that acquire a property using Stewardship funds, under Ch. 23, Wis. Stats. Conditions of gaining and maintaining that exemption include all those existing conditions in s.292.11(9)(e), Wis. Stats. In addition, the local unit of government would be required to enter into a negotiated agreement with the DNR, in accordance with s.292.11(7)(d)1., Wis. Stats., to ensure that the conditions in s.292.11(9)(e) Wis. Stats., particularly subdivision 4, are met once the LUG acquires the property. This may require the local unit of government to investigate and clean up portions of the property to ensure that the use of the property is not inconsistent with any contamination remaining at the property.

A related cross-reference to applicable sections of the Stewardship law may need to be made, if entering into an agreement or contract with DNR is a condition of being eligible for Stewardship funds.

Comments

Type of Change: Statutory change to s.292.11(9)(e), Wis. Stats.
Resources: None

2. LUGs: Clarify state and federal hazardous waste authority

Background

Great progress has been made in the last five years to relieve the concerns of local units of government over the involuntary acquisition of contaminated properties. With the clear exemptions from having to conduct an investigation and cleanup under the state's Spill Law or the federal Superfund law, local governments have begun to take proactive steps to acquire, and in some cases clean up, brownfields properties.

However, many local governments are still hesitant to acquire brownfields, particularly those where the state or federal government's Hazardous Waste Program may have legal authority to compel a cleanup due to past activities at the properties. The state and federal hazardous waste authorities apply not only to the operator of a hazardous waste facility, but also to any "owner." It is estimated that there are 1,500 tax delinquent brownfields properties in Wisconsin, and a large percent are estimated to be former hazardous waste facilities, such as old foundries, electroplating shops, waste oil facilities, and other heavy industrial use properties.

While the federal Superfund program has passed legislation to clearly exempt municipalities from liability if they involuntarily acquire a property, the federal Hazardous Waste Program has shown little or no interest in this area. Discussions with EPA's Region V office in Chicago have resulted in little substantial progress on this challenge - whether real or perceived - to brownfields redevelopment.

Proposal

Section 292.11(9)(e)ln. is created to read as follows:

292.11(n)(9)(e)1n.
Except as provided in section 292.15(7), a local governmental unit is exempt from the provisions of sections 291.25(1) to (5), 291.29, and 291.37 and rules promulgated under those provisions, with respect to the existence of a hazardous substance on the property, if it acquires the property under a method described in subd. 1m and if all of the following occur at any time before or after the date of acquisition:

1. An environmental investigation of the property is conducted that is approved by the Department which includes assessing the nature and extent, if any, of hazardous waste releases on the property since eighteen months after October 21, 1976.
2. The hazardous waste releases identified in the environmental investigation governed by subd. 1 are cleaned up by restoring the environment to the extent practicable and minimizing the harmful effects from a discharge of the hazardous waste in accordance with the rules promulgated by the Department and any contract entered into under those rules.
3. The local governmental unit obtains a certificate of completion from the Department that the property which has been identified to be the subject of a hazardous waste release since eighteen months after October 21, 1976 has been satisfactorily restored to the extent practicable, and that the harmful effects from said release of hazardous waste has been minimized.

4. The local governmental unit maintains and monitors the property as required under rules promulgated by the Department and any contract entered into under those rules.
5. The local unit of government does not engage in activities that are inconsistent with the maintenance of the property.
6. The local unit of government has not obtained a certification under subd. 3 by fraud or misrepresentation, by the knowing failure to disclose material information under circumstances in which the local unit of government knew or should have known about more discharges of hazardous waste since eighteen months after October 21, 1976 than were revealed by the investigation conducted under subd. 1.
7. The local governmental unit did not cause the release of any hazardous waste identified on the property.

Section 292.11(9)(e)1m. (intro) of the statutes is amended to read:
292.11(9)(e)1m. (intro) a local governmental unit is exempt from subsections (3), (4) and (7)(b) and (c), sections 289.05(1), (2), (3), and (4), 289.42(1), 289.67, and 292.31(8) with respect to property acquired by local governmental unit if any of the following applies:

Comments

DNR Comments:

1. The proposed State statutory exemption cannot affect the liability under Federal law of Local Governmental Units that acquire hazardous waste treatment, storage or disposal sites, so this perceived problem with redeveloping Brownfields will remain, to a certain extent.

2. Although the Department and Brownfields Group agree on the need for a conditional hazardous waste exemption for Local Governmental Units acquiring property involuntarily, the specific wording of the statutory revision is important. To reduce the risk that EPA might view the exemption as making Wisconsin's Hazardous Waste Program less than equivalent to EPA's, the Department recommends the following wording, which is based on the current exemption for Voluntary Parties:

Section 292.11 (9) (e) 1n. and (12) (c) are created to read:

292.11 (9) (e) 1n. Except as provided in sub. (12) (c), a local governmental unit is exempt from the provisions of sections 291.25(1) to (5), 291.29 and 291.37, stats., and rules promulgated under those provisions, with respect to the existence of a hazardous waste on the property, if it acquires the property under a method described in subd. 1m. and if all of the following occur at any time before or after the date of acquisition:
1. An environmental investigation of the property is conducted that is approved by the department which includes identifying any hazardous waste releases which occurred on the property.
2. The hazardous waste releases identified in the environmental investigation governed by subd. 1. are cleaned up by restoring the environment to the extent practicable and minimizing the harmful effects from a discharge of the hazardous waste in accordance with the rules promulgated by the department and any contract entered into under those rules.
3. The local governmental unit obtains a certificate of completion from the department that the property which has been identified to be the subject of a hazardous waste release

has been satisfactorily restored to the extent practicable, and that the harmful effects from the release of hazardous waste have been minimized.

4. The local governmental unit maintains and monitors the property as required under rules promulgated by the department and any contract entered into under those rules.

5. The local governmental unit does not engage in activities that are inconsistent with the maintenance of the property.

6. The local governmental unit has not obtained a certification under subd. 3. By fraud or misrepresentation, by the knowing failure to disclose material information under circumstances in which the local governmental unit knew or should have known about more discharges of hazardous waste than were revealed by the investigation conducted under subd. 1.

7. The local governmental unit did not cause the release of any hazardous waste identified on the property.

(12) (c) Subsection (9) (e) 1n. does not apply to any of the following:

1. A hazardous waste treatment, storage or disposal facility that first begins operation after the date on which the local governmental unit acquired the property.

2. A licensed hazardous waste treatment, storage or disposal facility operated on the property before the date on which the local governmental unit acquired the property and that is operated after the date on which the local governmental unit acquired the property.

3. Any hazardous waste disposal facility that has been issued a license under s. 144.441 (2), 1995 stats., or s. 289.41 (1m), or rules promulgated under those sections, for a period of long–term care following closure of the facility.

We believe that we have substantive agreement on this proposed language.

3. The following should also be included in the statutes as an exemption from this exemption, similar to the voluntary party liability exemption:

Section 292.11(9)(e)6 is created as follows:

6. Subdivision 1m does not apply to a municipal waste landfill, as defined in s.289.01(22), or to an approved facility. We believe that we have substantial agreement on this proposed language.

4. We recommend that the following language be discussed and considered for inclusion in Section 292.11(9)(e)7.

7. Subdivision 1m. does not apply if the local governmental unit fails to comply with a condition of a plan approval, order or exemption under ch 289 relating to monitoring or long-term care of the property acquired.

The discussion regarding the inclusion of an exemption for solid waste facilities occurred very late in the process. We would like the opportunity to discuss the merits of including such language in the proposed statutory changes.

Type of Change: Statutory
Resources: None

3. LUGs: Clarify Requirements to Remove Underground Storage Tanks

Background

The Department of Commerce has the responsibility in Wisconsin to implement the federal underground storage tank regulations pertaining to the installation and removal of underground storage tanks (USTs). In instances where LUGs have acquired a property involuntarily they have been required by Commerce to remove the underground tanks. The LUGs are requesting that Commerce provide them with more clear, up front information regarding the flexibility under Commerce's current administrative code available to the LUGs with respect to the removal of the tanks.

Proposal

Commerce should create a fact sheet or equivalent public outreach document which would:

- Inform local units of government of the flexibility in current regulations pertaining to the timing of removal of tanks and options if an environmental assessment has been completed for the property.
- Include this document with all orders that are sent to local units of government.
- Conduct appropriate public outreach to Commerce staff, other state agency staff and local units of government on this topic.

Comments

Department of Commerce Comments: Municipalities are currently provided flexibility in the removal of tank systems. In most instances, if the tank system is verified as empty, the unit of government can obtain reasonable extensions to conduct final removal. In some instances this has been up to a year. In the code, up to a year is provided (with appropriate approvals) to permanently close a tank system after it is taken out of service. The issue that is being identified by the municipalities may be that a year or more may have already passed before the property is taken over and this negates some of the initial flexibility provided by the code.

Ten years into the effort to remove substandard petroleum tank systems, it is unlikely that any unit of local government would still be unaware of the potential or cost of tank system removal. Consequently, current and future actions are measured and based upon assessments of when tank closure can be completed. Flexibility is provided to the local unit of government, if movement is being made to complete the closure of the tank systems. Inspectors regularly work with local units on these issues. In addition, if an environmental assessment is completed on the property, additional time extensions can be approved before closure has to take place.

Type of Change: Administrative
Resources: None

4. LUGs: Eliminate Requirement to Conduct Cleanup of Federally-defined Underground Storage Tanks

Background

Local units of government that acquire properties involuntarily, as detailed in s.292.11(9)(e), Wis. Stats., are exempt from having to investigate or clean up such a property, unless the discharge is from an underground storage tank regulated by federal law. Many municipalities would like this "exception" removed so that they are exempt from addressing discharges from state-defined – as well as federally-defined – underground storage tanks (USTs).

Proposal

Repeal s.292.11(9)(e)(3), Wis. Stats.

Comments

DNR Comments: No federal UST exemption exists for LUGs that acquire property involuntarily.

Type of Change: Statutory
Resources: None

5. LUGs: Definition of Local Unit of Government

Background

The definition of Local Unit of Government in s.292.11(9)(e), Wis. Stats., clarifies what entities are eligible for the exemption from the Spill Law. Currently, that definition includes: municipalities, redevelopment authorities, public bodies designated under s.66.431, Wis. Stats., and housing authorities.

Proposal

Include "community development authority" in the definition of LUG in s.292.11(9)(e)1, Wis. Stats.

Comments

Type of Change: Statutory
Resources: None

Chapter 2 – FINANCIAL INCENTIVES for Brownfields

There are a number of useful financial tools to help Wisconsin businesses and communities with brownfields cleanup and redevelopment. However, there are still brownfields funding "gaps" that need to be identified and solutions proposed to fill those gaps. The Brownfields Study Group looked at the federal, state, and local programs available to assist with brownfields projects to see where improvements could be made and where new programs were needed.

When contaminated property is turned around and finds a productive use, there are important social, economic and environmental benefits for neighborhoods and for the State of Wisconsin. The Study Group felt that there is a need for all relevant government programs to provide incentives for communities and businesses to take a proactive role in "recycling" these properties. Brownfields redevelopment is a challenging task and the Study Group recognized that there is not one financial tool that can work for every situation.

The issues and incentives described in this chapter include a wide range of ideas to make these existing programs more useful and effective and to create new financial incentives to fill critical funding gaps in brownfields funding. For example, for municipal brownfields projects, the Study Group discussed enhancing existing programs or whether a new program should be created to fill this need.

The chart on the next page summarizes the Study Group's proposed changes to existing programs and a new grant program to address municipal projects.

Incentives proposed in this Chapter:

- ➢ **Provide Permanent Funding Source for Brownfields Grant Program**
- ➢ **Increase Funding for the Brownfields Grant Program**
- ➢ **Provide Flexibility with Development Zone Tax Credits**
- ➢ **Create New State-wide Brownfields Tax Credit for Remediation Costs**
- ➢ **Modify WHEDA Loan Guarantees**
- ➢ **Market Department of Transportation Brownfields Funds**
- ➢ **Expand Activities of the Community Block Grant/Blight Elimination Program**
- ➢ **Clarify Relationship of Brownfields and the Stewardship Program**
- ➢ **Modify DNR Land Recycling Loan Program**
- ➢ **Modify Environmental Remediation Tax Incremental Financing (ER TIF) District**
- ➢ **Provide Funding for Neighborhood Revitalization Brownfields Projects**

Table 1. Financial Incentive Programs – Proposed New Programs and Changes to Existing Programs.

Name of Program	Agency	Type of Program	Proposal	Funding (annual)		Eligible Activities		Eligible Parties		Resources	
				Existing	Proposed	Existing	Proposed	Existing	Proposed	Existing	Proposed
Wisconsin Brownfields Grant	Dept. of Commerce	Grant	Increase Funding	$5 Million	$15 Million	Acquisition, Demolition, Cleanup, & Redevelopment	No Change	Local Governments, Local Development Corporations & Businesses	No Change	2 FTE	No Change
CDBG Blight Elimination and Brownfields Redevelopment (BEBR)	Dept. of Commerce	Grant	Expand Existing Program	$2.5 Million	No Change	Assessment & Cleanup	+ Planning	Small Local Governments (Not CBDG entitlement communities)	No Change	Not Available	No Change
Land Recycling Loan Program	Dept. of Natural Resources	Loan	Expand Existing Program	$10 Million	No Change	Cleanup	+Assess-ment	Local Governments	No Change	1 FTE	No Change
Environmental Remediation Tax Incremental Financing (ER TIF)	Dept. of Revenue	Tax Incentive	Expand Existing Program	N/A	N/A	Assessment & Cleanup	+Demolition, Tax Cancellation, & Acquisition	Local Governments	No Change	None	+ 1.5 FTE
Neighborhood Revitalization Program	Dept. of Natural Resources	Grant	New Program	None	$5 Million	None	Assessment, Demolition, & Cleanup	None	No Change	None	+ 2 FTE
Development Zone Tax Credits	Dept. of Commerce/ Revenue	Tax Credit	Expand Existing Program	$21 million TOTAL credits	No Change	Assessment & Cleanup	No Change	Businesses	+ Local Governments & Non-profits	Not Available	No Change
State-wide Brownfields Tax Credit	Dept. of Commerce/ Revenue	Tax Credit	New Program	None	Undeter-mined	None	Assessment & Cleanup	None	Businesses, Local Governments, & Non-profits	None	Undeter-mined
Sustainable Urban Development Zones (see Chapter 4)	Dept. of Natural Resources	Multi: Land Recycling Loan; ER TIF; Tax Credits	New Program	None	$5-10 Million from Land Recycling Loan; ER TIF; Tax Credits	None	Assessment & Cleanup of Area-wide Contamin-ation	None	Local Governments & Business Improvement Districts	None	+ 3 FTE

Issue: Provide Permanent Funding Source for Brownfields Grant Program

Background

The Study Group was directed by the state Legislature to "study the potential methods to provide long-term funding of brownfields financial assistance programs." The Environmental Fund is the funding source for the Brownfields Grant program, which is authorized to provide $10 million per biennium in grants, and will sunset in the year 2001.

The Brownfields Grant Program was created by the Legislature and governor in the 1997 biennial budget. With limited funding and thousands of potential eligible brownfields sites throughout the state, it was decided that the most productive value of the Brownfields Grant Program would be based on the following four criteria: 1) economic impact of the project (50%); 2) positive effect on the environment (25%); 3) quality and quantity of an applicant's contribution (15%); and 4) innovativeness of the redevelopment project (10%).

Presently, the current demand for the Brownfields Grants far exceeds available funds. While $10 million was available during the first two rounds of competition in 1998, approximately $40 million was requested by 81 applicants to cleanup and redevelop brownfields properties.

Several potential funding sources were examined, including: repealing the sunset on the current funding source (the Environmental Fund via a fee on new and used vehicles), increasing the real estate transfer fee, apportioning a percentage of the existing real estate transfer fee, creating a special assessment on greenfields development, using bonds to support the proposed increase in grant funds, a one-time apportionment from the state's budget surplus and apportioning money from General Program Revenue.

Proposal

- To continue funding, the Study Group proposes that the following represents the most feasible means to continue funding for the Brownfields Grant Program:
  - Continue to use money from the Environmental Fund by repealing the sunset on the vehicle environmental fee.

Comments

WMC's Comments: WMC supports continued funding of the Brownfields Grants Program, but does not support continuance of the vehicle environmental fee.

Type of Change: Statutory
Resources: $10 million per biennium is needed to continue the current level of funding for the grant program.

Issue: Increase Funding for the Brownfields Grant Program

Background

For the first two award cycles, 81 applications were submitted totaling $40 million in requests. Only $10 million could be awarded to 26 projects. These 26 projects represent progress toward redeveloping brownfields into productive uses. Specifically, the awarded projects will result in the betterment of 321 acres of abandoned or under-used contaminated sites into healthy viable properties. The successful redevelopment of these projects will cause an increase of over $70 million in property values and the creation of 2,000 new jobs.

Proposal

The following was recommended by the Study Group:

- To meet the high demand for this grant program, the amount of funding each fiscal year should be increased from $5 million to $15 million, for a total of $30 million over the biennium.

An additional item related to the eligible parties was to expand eligibility beyond the current municipalities, individuals or local development corporations:

- Allow trusts to be considered as individuals so they can be eligible for the grants.

Comments

WMC's Comments: While WMC does not oppose providing additional resources for brownfields from existing revenues, it is unclear what the source of the funding for this proposal would be.

Type of Change: Statutory
Resources: An additional $20 million per biennium for the grant program.

Issue: Provide Flexibility with Development Zone Tax Credits For Remediation

Background

The Wisconsin Community Development Zone (CDZ) and Enterprise Development Zone (EDZ) Programs help businesses start, expand, or relocate to specially designated areas in Wisconsin, which have higher than the state average unemployment rates, the percentage of people at or below 80% of the statewide median household income is higher than the state average, and the percentage of households receiving unemployment or public assistance is higher than the state average. These tax benefit programs are designed to encourage private investment and to improve the quality and quantity of employment opportunities in disadvantaged communities. Tax benefits are available to businesses that meet certain requirements and are located, or willing to locate, in one of Wisconsin's development zones. In addition to job creation tax credits, businesses in development zones can receive a 50% environmental remediation tax credit. Local governments or non-profit organizations that clean up brownfields are unable to use tax credits.

The Study Group proposes to allow more flexibility within the existing Development Zone remediation tax credits by: allowing LUGs and non-profits to sell and transfer remediation tax credits for the purpose of paying for remediation costs and attracting end users to projects; and, allowing businesses to sell or transfer tax credits as well.

Proposal

- To provide more flexibility with the remediation tax credits within current Development Zones, the Study Group proposes the following:

  - Bankrupt businesses or those carrying previous tax losses are unable to use tax credits. Any entity that undertakes the cleanup should be able to offset that cost through the sale of the tax credit.

  - Local governments and non-profit entities undertaking cleanup activities are ineligible for tax credits because they do not pay Wisconsin income tax. The credit associated with the clean-up costs should be directly transferable to the end user as an economic development incentive.

  - Public and non-profit entities should be able to partially finance brownfields remediation and redevelopment with funding from the sale of environmental tax credits in the secondary market, similar to the processes for the Low Income Housing Tax Credit (LIHTC) and the Historic Rehabilitation Tax Credit (RTC) programs. The sale of these credits would generate income to help offset remediation costs.

  - Allow development zone tax credits to be transferred from private to public and/or private entities.

Comments

Department of Revenue (DOR) Comments: The DOR does not support the proposals under this issue.

DOR does not endorse the concept of the sale of tax credits; tracking of these credits will impose a large administrative burden on the Department as well as all of the parties involved.

Transfer of tax credits to the from the local unit of government or a non-profit to an end-user does not provide any additional incentive to remediate the site and are contrary to the principle of tax credits which is to offset tax liability expended for the purpose of the credit.

The statement in the text regarding the sale of credits in the secondary market is not correct. The sale of low-income housing credits in the secondary market only applies to the owner of the property. The resale of these credits is not a proper usage of tax credits, nor is it consistent with the purpose of development zones.

Department of Commerce Comments: The Department of Commerce is supportive of making the existing Development Zone program as useful as possible for brownfields projects, however, the Department can not support this proposal for the following reasons.

- Proposal: municipalities should be able to conduct a cleanup and transfer the cleanup tax credit to a business as an incentive.
  Comment: Allowing tax credits to be transferred to other parties (or bought and sold for that matter) has the potential to create a number of problems with the present program. The program has always been sold as a performance based one with little fiscal impact because the credits would be used to offset a particular businesses tax liability which has increased as a result of the project. An alternative suggestion would be to create a separate development zone tax credit entirely for municipalities that clean up sites and allow them to pass along a credit directly to the developer of the site as an incentive.

- This section of the report says that bankrupt businesses or those with previous tax losses cannot take advantage of the DZ credits. This is not accurate. The CDZ and EDZ credits have a fifteen-year carry forward period. Businesses thus have fifteen years in which to claim credits after earning them. Even if a business has no net tax liability when the credits are earned, it still has fifteen years in which it may use the credits.

- The CDZs and EDZ programs ensure that the environmental remediation credit is tied to providing employment opportunities, since at least 25% of the credits a person claims must be for creating or retaining jobs. The objective of the credit is thus not just cleaning up properties -- but using them to improve employment opportunities.

WMC's Comments: WMC generally supports this proposal.

Type of Change: Statutory, Regulatory
Resources: None

Issue: Create New State-wide Brownfields Tax Credit for Remediation Costs

Background

The Wisconsin Community Development Zone (CDZ) and Enterprise Development Zone (EDZ) Programs help businesses start, expand, or relocate to specially designated areas in Wisconsin, which have higher than the state average unemployment rates, percentage of people at or below 80% of the statewide median household income is higher than the state average, and the percentage of households receiving unemployment or public assistance is higher than the state average.

These tax benefit programs are designed to encourage private investment and to improve the quality and quantity of employment opportunities in disadvantaged communities. Tax benefits are available to businesses that meet certain requirements and are located, or willing to locate, in one of Wisconsin's development zones.

In addition to the job creation tax credits, businesses in development zones can receive a 50% environmental remediation tax credit. Development Zone tax credits are obviously of limited use for brownfields redevelopment projects that lie outside of these special zones.

Proposal

- The Financial Incentives Study Group proposes to make Brownfields Remediation tax credits available throughout the state for use by municipalities, businesses and non-profits for direct use, transfer or sale. This would enhance the economic feasibility of all brownfields projects and promote voluntary cleanups statewide. To limit the burden on the state, the tax credits should incorporate appropriate fiscal restrictions.

- The following ideas to limit or target the tax credits were discussed:
  - capping the total amount of credits available;
  - instituting a sunset on the tax credits;
  - excluding PECFA sites and parties who caused the contamination;
  - limiting the credit to certain geographic areas; and
  - limiting the credits to sites where the cleanup costs exceeds the value of the property.

Comments

DOR Comments: DOR does not support expansion of the brownfields tax credits throughout the state. This proposal is in conflict with the concept of revitalization zones. Even if caps are imposed, DNR and DOR could be placed in the position of having to approve some projects while rejecting or delaying others due to cost factors. Brownfields sites are already eligible to apply under the existing Enterprise Development Zone program.

Department of Commerce Comments: The Department of Commerce believes that the creation of a state-wide brownfields tax credit would not be an effective brownfields tool based on the following:

- Availability of the environmental remediation credit throughout the state would dilute the CDZ and EDZ programs. The DZ credits are used to encourage economic development in extremely needy areas of the state by encouraging businesses to locate or expand in those areas. Making the environmental remediation credit available outside of the zones could change business behavior and inhibit development in places where it is most needed. Also, the Department is still evaluating the effectiveness of the current CDZ and EDZ remediation tax credits. It was just raised to the 50% level in '98 and because of the fact that it is not an upfront grant or loan it is questionable whether or not it will be an attractive incentive for brownfields redevelopment. The Department suggests that the use of this tax credit in the current program be evaluated within the next two years and then determine if a state-wide tax credit would be appropriate.

- The forgone revenue that would be needed to create a new tax credit could potentially draw down the state's GPR and take away any increases to the Brownfields Grant Program. It is important to consider that each state agency has been asked to reduce their budgets for the next biennium, therefore the Department believes that the best use of any additional funds would be better served through the Brownfields Grant Program. The Grant program will be returning brownfields to productive uses, including the betterment of 321 acres of contaminated property, the creation of 2,000 jobs, and the return of over $70 million in taxable properties.

WMC's Comments: WMC supports expanding the current brownfields tax credits and funding those credits through existing state resources. Furthermore, appropriate restrictions on the availability of such credits should be further examined.

The City of Milwaukee's comments for this issue are found in Appendix A.

Type of Change: Statutory and Regulatory
Resources: None

Issue: Modify Wisconsin Housing and Economic Development Authority (WHEDA) Loan Guarantees

Background

The 1997-99 Wisconsin Budget provided a Brownfields Remediation Loan Guarantee program (AB 27) administered by the Wisconsin Housing and Economic Development Authority (WHEDA). Initial reaction from the lending community has been mixed. The Study Group expressed concerns about the program's limitations. Using project property as a security is not a viable tool when environmental contamination has made the property's value negligible. Also, the program is not set up to fund risky projects.

Proposals

- Businesses should be able to offer collateral other than the project property as a security interest.

- Authorize WHEDA to undertake more entrepreneurial lending practices, such as taking second positions on loans. To balance the additional risks, WHEDA should be allowed to buy down the interest rate.

Comments

DNR Comments: The Brownfields Loan Guarantee program has only been available since July 1, 1998.

WHEDA Comments:
First proposal: The statute does not restrict the type of collateral that may be used. Specifically, s.234.88(2)(e) reads: "The participating lender obtains a security interest in any equipment, machinery, physical plant or OTHER ASSETS to secure repayment of the loan" (emphasis added).

WHEDA interprets 234.88(2)(e) broadly and believes that the statute is sufficiently expansive to cover any collateral beyond the project property. WHEDA opposes Proposal 1.

Second proposal: WHEDA vigorously opposes any action that would mandate additional risk to the Wisconsin Development Reserve Fund (WDRF). Underwriting like a venture capital, as originally proposed, would damage the Brownfields Program, the WDRF and the WDRF's other underlying programs.

Further, WHEDA opposes authorization to buy down the interest rate on loans. The proposal suggests that this would be merely a statutory and regulatory change and no new resources would be provided. However, interest rate buydowns are expensive, especially on large loans, and the Study Group's proposal amounts to an unfunded mandate on the WDRF. Again, WHEDA opposes any action that would place the WDRF at additional risk.

Additionally, no statutory change is needed to accommodate second positions on loans. As a matter of policy, WHEDA will consider a second position on Brownfields Remediation Loans as

we do with other WHEDA programs. However, we will do so only if the WDRF is adequately protected.

Finally, the WDRF was recently the subject of a legislative audit that evaluated the fiscal health of the fund. We are implementing Legislative Audit Bureau recommendations and our own to improve the long-term viability of the fund. We oppose any recommendation that would intentionally place the fund at greater risk. For these reasons WHEDA opposes the second proposal.

In conclusion, we disagree with the Study Group's premise that "the program is not set up to fund risky projects." By definition, a loan guarantee program serves only those projects that are high risk and fail to meet a lender's prudent underwriting guidelines. The state's pledge of support mitigates the lender's risk.

While we believe this program can be an important tool for environmental remediation, community development and business expansion, we oppose any effort to place the state tax dollars at undue risk. The program is still in its infancy and needs a chance to be evaluated by the marketplace. We ask that no changes of any kind be made to the program at this time.

Type of Change: Statutory and Regulatory
Resources: None

Issue: Market Department of Transportation (DOT) Brownfields Funds

Background

Four Department of Transportation (DOT) financial assistance programs were identified as providing assistance with brownfields redevelopment. The General Infrastructure Assistance, Transportation Enhancement (TEA 21), Transportation Economic Assistance (TEA), and State Infrastructure Bank (SIB) provide funding for various transportation-related components of brownfields projects. Funding is available to investigate and remediate contamination, to improve or create transportation infrastructure, and to redevelop former transportation facilities.

Proposals

- These programs should be more aggressively marketed to ensure optimum utilization to assist the cleanup and redevelopment of brownfields properties.
- Funding cycles should be on a yearly basis.

Comments

WMC's Comments: WMC supports the promotion of these programs.

Type of Change: Administrative
Resources: None

Issue: Expand Eligible Activities of the Community Development Block Grant/Blight Elimination and Brownfields Redevelopment (CDBG-BEBR) Program

Background

The U.S. Department of Housing and Urban Development (HUD) provides funding to the Department of Commerce for the small cities Community Development Block Grants (CDBG) program. The Department of Commerce allocates a portion of this funding to the Blight Elimination and Brownfields Redevelopment (BEBR) program, which provides grants to municipalities (excluding entitlement communities) for site assessments, environmental investigations, and cleanup.

These grants are available to brownfields redevelopment projects that will generate commercial or industrial jobs, as specified in Commerce administrative rules.

Communities throughout the state are interested in using BEBR funds for brownfields redevelopment projects. Many brownfields projects support the federal CDBG program goals, including (1) benefiting low- and moderate-income families; (2) preventing or eliminating slums or blight, or (3) meeting other urgent community development needs. In some instances, projects cannot be considered for BEBR funds because they will not generate jobs, a criteria of Commerce's administrative rules.

In situations where it is necessary to determine best use of a brownfields, communities may not have sources of funding available for determining an end use. Also, the level of remediation can be dependent on the end use of a property. Funding for communities to conduct market analysis and redevelopment planning to precede assessment and remedial action planning should be available.

Proposals

- The CDBG-BEBR program should be expanded to provide funds to projects that will have a project end use with taxable value.
- Expand eligible activities under the CDBG-BEBR program to include redevelopment planning.

Comments

Department of Commerce Comments: The Department supports recommendations that will make the CDBG – BEBR program more useful for communities wanting to redevelop brownfields. The Department supports the recommendations made by the Financial Subgroup that include using BEBR funds that will result in projects where the property will have a taxable value. The Department believes that the BEBR program should be used for projects that will benefit communities, which includes things such as job creation and placing parcels back on the tax roll. Any proposed projects which have commitments of improving the conditions for low-to-moderate income people by creating jobs and having a taxable end-use can already be funded through the BEBR program.

To use BEBR funds for non-tax paying uses, such as parks, athletic fields, would be adverse to the mission of the program to provide benefits to communities through job creation and returning brownfields to the tax base. Parks and athletic fields require substantial financial support to create beyond the cleanup costs, which would cause increase in taxes upon low and moderate-income persons. To use BEBR funds to increase the costs to taxpayers would be contrary to the program's goals. The goals of the BEBR program are to return properties to viable uses that decrease the tax burdens on citizens and provide job opportunities.

Regarding the use of BEBR funds for redevelopment planning, federal law allows redevelopment planning to be an eligible use of CDBG funds.

Type of Change: Statutory and Regulatory
Resources: Continue current level of funding from the state's CDBG for the BEBR program.

Issue: Clarify Relationship of Brownfields and the Stewardship Program

Background

Local units of government and nonprofit conservation organizations are eligible to apply for grants under the Knowles-Nelson Stewardship Program. The overall merits of a project determine where it falls in the rating system and whether it can be funded. Brownfields projects receive greater weight in grant rating systems in three of the Stewardship components:

- Urban Green Space Program – for the acquisition of open natural areas in and near urban areas
- Urban Rivers Program – for the preservation or restoration of urban rivers and river fronts
- State Trails Program -- for acquisition of land for recreational trails which have been specifically designated as "state trails"

Proposals

The DNR should carry out the following administrative proposals in order to clarify the relationship of brownfields to stewardship:

- Ensure that the Stewardship Program's "Open Project Selection Process Handbook" includes information on brownfields as a criteria for ranking stewardship projects.
- Recommend that the relevant DNR bureaus, such as Facilities and Lands, Community Financial Assistance, and Remediation and Redevelopment, work together to clarify issues relating to both the assessment (i.e., property valuation) of properties and eligible options for acquiring a brownfields property under Stewardship. This proposal recommends that the DNR look at issues such as acquisition of properties through nontraditional means, such as tax delinquency proceedings, and whether Stewardship grants for such acquisitions are available.

Comments

At one point in the Brownfields Study process, a proposal was put forth that would allow Stewardship money to be available to investigate and clean up properties where the end use is green space.

Type of Change: Administrative
Resources: None

Issue: Modify DNR Land Recycling Loan Program

Background

The $20 million DNR Municipal Land Recycling Loan Program was created as part of the 1997-99 biennial budget process to assist municipalities clean up properties they own but did not contaminate. The loans are available for both landfill and non-landfill projects (e.g., brownfields). This program utilizes monies repaid to the state from federal Clean Water Fund Program (CWFP) loaned to municipalities for traditional CWFP projects such as wastewater treatment facility construction. The DNR is finalizing administrative rules to implement the funds; however, the Brownfields Study Group members have expressed a number of concerns about the loan program.

Proposal

Amend the DNR Municipal Land Recycling Loan Program in the following manner to be more attractive to municipalities:

Statutory

- adopt the definition of local units of government found in s.292.11(9)(e) Wis. Stats. with respect to parties eligible for loans and add community development authorities as an eligible recipient;

- streamline the administrative process of applying for and awarding the loans; current system is too cumbersome for municipalities and will likely function as a disincentive to using this program;

- significantly reduce the interest rate to make it more attractive to large municipalities, who may be able to issue bonds at similar rates, without all the paperwork associated with the current loan process; consider zero percent interest loans;

- allow loans to be given to conduct, not to refinance, site investigations; loans are less appealing if a municipality cannot receive up-front loans to conduct Phase I and II environmental assessments and site investigations; and

- modify loan program to allow loans to be given to local units of government for use in areas designated as Wisconsin Sustainable Urban Development Zone Programs (please see Chapter 4, "Create Financial Incentives for Cleaning Up and Redeveloping Area-wide Brownfields Contamination").

Regulatory

- current criteria in administrative rules are too focused on environmental impacts, such as private wells, and will likely favor rural landfill or brownfields projects; criteria need to focus on urban projects, many of which have public water supplies.

Comments

DNR Comments: Regarding changing the definition of local units of government, under the current LRLP law only political subdivisions defined as cities, villages, towns, and counties are eligible. This change would add redevelopment authorities and housing authorities as eligible loan recipients.

A requirement of the LRLP states that loan repayments must be secured by a dedicated source of revenue, and at present this is interpreted to mean a general obligation pledge, which only cities, villages, towns(including town sanitary districts), counties, school districts, metropolitan sewerage districts, park commissions, technical college districts, and inland lake protection districts are legally authorized to pledge. Redevelopment authorities and housing authorities which are referenced by s.292.11(9)(e) Wis. Stats. may only issue non general obligation bonds and notes. Since brownfields remediation does not produce a revenue stream, these authorities would not be able to pledge an adequate obligation to secure the loan.

This change, if it could be implemented, might result in more defaults on loans and a decrease in the corpus of the Environmental Improvement Fund. In addition, poor credits in this portfolio could increase the rate the state would have to pay for Environmental Improvement Fund bonding thereby increasing the rates for Safe Drinking Water and Clean Water Fund projects. CF would oppose this change unless an acceptable security for these entities could be pledged and it could be assured that rates for other programs would not be adversely affected.

In regards to streamlining the LRLP of applying for and awarding the loans, The LRLP application process was modeled after the Clean Water Fund Program's and Safe Drinking Water Program's application process. This process has been successfully employed on over 300 loans exceeding $1 billion. The process has not been viewed as overly cumbersome or as a disincentive for applying for a loan.

The process requirements were developed in order to determine whether the applicant is proposing a project that complies with DNR technical requirements and to obtain information about the financial feasibility of the project relative to the applicant's ability to repay the loan. This latter information would be required by any financial institution prior to making a loan decision.

In regards to reducing the interest rates for LRLP loans, All of the programs currently funded from the Environmental Improvement Fund utilize the same interest structure. The standard interest rate for Clean Water Fund, Safe Drinking Water, and Land Recycling Loan projects is 55% of the market rate. This rate has been very attractive to municipalities and is substantially lower than normal municipal borrowing rates. It is inaccurate to assert that municipalities can borrow money at a lower rate than available through the LRLP. If interest rates for the LRLP were lowered it should be to reflect a higher priority for brownfields remediation over drinking water or wastewater treatment projects.

In regards to amending the LRLP statute to allow loans to be given to conduct, not refinance, site investigations, the primary reason site assessments and investigations are refinanced or reimbursed is because this is the most satisfactory method that has evolved from nearly a decade of experience in making hundreds of Clean Water Fund Program loans. The Clean Water Fund Program funds municipal sewer and wastewater treatment projects that also have a planning and design component similar to brownfields remediation. The Clean Water Fund Program is structured as a tax-exempt municipal bond program. The Internal Revenue Service requires that

projects using tax exempt financing be capital improvements. Site investigations are not capital improvements and would require the CWFP to take a taxable bond from the municipality rather than a tax-exempt bond.. The current structure of the LRLP circumvents this problem by refinancing or reimbursing these up-front project costs at the time funding is awarded for the capital project. This method has been used for the last four years in the Clean Water Fund Program and has been widely accepted by the municipalities.

Administering the many very small loans which would result from providing separate funding for site assessments would require substantial modifications to the existing financial electronic record-keeping and project management systems, which would be very expensive. In addition, the costs associated with applying for these small loans relative to their size would likely make the program unattractive to applicants.

In regards to current criteria in the administrative rules favor rural landfills or brownfields projects, the proposed administrative rules were developed to reflect the primary intent of the statute, that is to remedy environmental contamination of sites or facilities at which environmental contamination has affected groundwater or surface water or threatens to affect groundwater or surface water. Since the source of the funding for the LRLP is the Clean Water State Revolving Fund, both state and federal laws require that the priority uses of the fund be directed toward improving water quality.

The existing priority scoring system is not designed to favor rural or urban areas, but rather to favor those projects with the most significant environmental impacts.

Type of Change: Statutory, Regulatory
Resources: None

Issue: Modify Environmental Remediation Tax Incremental Financing (ER TIF) District

Background

The State of Wisconsin created a new type of Tax Incremental Financing (TIF) district – an Environmental Remediation or ER TIF – as part of the 1997-99 biennial budget. The purpose of the ER TIF is to provide political subdivisions -- cities, villages, towns or counties – with an additional tool to finance the investigation and cleanup of environmentally contaminated properties, often referred to as brownfields. The ER TIF functions as a mechanism to reimburse those political subdivisions for their costs, after the cleanup is complete. The political subdivision must own the property at the time the cleanup takes place and cannot have caused the contamination. The ER TIF has the potential to be a powerful incentive to cleanup brownfields, particularly at those properties overlooked by the private sector.

Proposals

The following proposals are offered:

- Expand definition of "eligible costs" [s.66.462(1)(c), Wis. Stats.] to include the following:

  "'Eligible costs' means the cost of acquiring property for the purposes of remediating environmental pollution on that property, the cost of canceling delinquent taxes, penalties or special assessments and charges for the property and the capital costs, financing costs and administrative and professional service costs for the demolition of structures on that property, for an environmental assessment (including Phase I and II) and investigation of the property and for the removal, containment or monitoring of, or the restoration of soil, groundwater, air, surface water, sediments or any other media affected by, environmental pollution on the property including monitoring costs …"

- Modify the statutes to have the ER TIF follow the normal TIF process and recognize costs incurred during the first seven years (s.66.46(6) (am) 1, Wis. Stats.) after the district is created. At the end of the seventh year allow the political subdivision to estimate the "present value of future operation maintenance and monitoring costs" associated with obtaining closure for the site as an eligible cost.

- Modify "use of environmental remediation tax increments" [s.66.462(2), Wis. Stats.] to: allow a political subdivision to create a TIF on a property where it incurs eligible costs, regardless of whether or not they own the property.

- Modify "certification" requirements [s.66.462(4)(a), Wis. Stats.] to: allow the political subdivision to seek from the Department of Revenue authority to create the ER TIF once the DNR has approved the Ch. NR 716 site investigation report and the Remedial Action Options Plan. At that time sufficient information should be available for the

Joint Review Board to make a determination that the ER TIF should be created. This process takes place prior to submittal of the TIF plan to DOR.

- Allow multiple contiguous properties to be in ER TIF;

- Support DOR's budget request to avoid "double reimbursement" concerns; DOR is proposing budget amendments to the ER TIF to clarify that if a political subdivision receives remediation funds from other federal, state, or local sources (e.g., PECFA or Commerce grants), they must reduce the "eligible" ER TIF costs by that amount; in other words, they cannot receive a Commerce grant to remediate the property and then claim those same costs as ER TIF eligible.

- Create new authority for ER TIF creation in DNR-approved "Sustainable Urban Development Zone (SUDZs)" (also, please see the Area-Wide Groundwater Proposals for more information on SUDZs):

  - allow multiple properties to be in ER TIF;
  - allow political subdivisions to establish ER TIFs after establishment of an SUDZ – do not tie creation of ER TIF to approval of cleanup documents;
  - allow political subdivision to use ER TIF revenues to provide grants or loans to properties within the ER TIF as long as they are for an "eligible cost;"
  - limit any funds provided to non-political subdivisions to those persons who commenced site investigation within two years of an SUDZ creation and had the remedial action plan for the property approved within five years of commencing the site investigation or creating the SUDZ.

Comments

DOR Comments: Regarding expanding the definition of "eligible costs, " the DOR supports limited expansion of ER TIF eligible costs to include demolition and other costs specific to remediation; however, it opposes the inclusion of delinquent taxes, penalties and special assessments as eligible costs under ER TIF. Current law provides a procedure for the recovery of delinquent taxes from the proceeds of a tax sale. That the sale proceeds are insufficient to cover the delinquent taxes is often due to delayed action by the municipality or county in taking tax title to the property; the proposal may encourage further delay. More importantly, the proposal would result in taxpayers paying for the delinquent taxes twice – first through the county levy and second as a TIF cost.

Regarding modifying the "use of remediation tax increments," the DOR is mindful of the need for flexibility in regard to transfers of ownership in the remediation process. However, the proposal to include remediation costs of private property departs from the original intent of the ER TIF – to be a financing tool for municipalities wishing to remediate abandoned property. If this proposal is adopted, additional safeguards are needed to prevent public subsidy of costs that should be borne by responsible parties.

Regarding modifying "certification" requirements, the DOR assumes this proposal to mean that the ER TIF life begins after approval of a site investigation report rather than after the remediation is complete. The Department recommends that the approval be contingent on an approved remedial action plan with cost estimates as well as a site investigation report. This would provide the Joint Review Board with the data necessary to make an informed decision.

Regarding the ER TIF within "Sustainable Urban Development Zone:"

- Allow multiple parcels

  Parcels within an ER TIF boundary must be part of the same overlying taxing jurisdictions. The Department would prefer that the ER TIF district be made up of contiguous parcels. Expanding ER TIF boundaries to include multiple parcels suggests the need for prudent limits. These could be based on value limits akin to the regular TIF 5%/7% value limitations; alternatively, these could be based on the number of parcels within a municipality.

- Do not tie creation of TIF to approval of clean-up documents.

  The Department believes that clean up documents, whether prior to the clean up (approved site investigation reports and approved remediation action plans with cost estimates) or subsequent to the remediation (close out DNR letter with costs quantified) are required for the Joint Review Board to make an informed decision of the viability of the ER TIF.

The City of Milwaukee's comments for this issue are found in Appendix A.

Type of Change: Statutory

Resources: The expansion of ER TIFs to include greater eligible costs and multiple, possibly non-contiguous, parcels will increase DOR administrative costs. An additional 1.0 FTE Property Assessment Specialist and 0.5 FTE Property Assessment Technician are needed to handle the additional workload.

Issue: Provide Funding for Neighborhood Revitalization Brownfields Projects

Background

In 1997, the Legislature and governor greatly expanded Wisconsin's Brownfields Initiative, by creating a number of brownfields funding mechanisms. Specifically, a brownfields grant program for private and public entities and a low-interest loan program for municipalities were created. While there are a range of programs available to fund brownfields redevelopment, local governments still have a number of needs that are not being met. This is particularly evident at properties where there is no current private sector commitment of jobs or where the property's end use is for public purposes. Projects involving green space, light commercial development, housing and those that have no currently job commitment generally have a difficult time securing funding.

In addition, many brownfields properties contain not only environmental challenges but the structures remaining on the properties represent unique challenges to many local governments. These building are often obsolete because they do not fit current manufacturing needs – most are multilevel structures with inadequate space. Often these structures contain asbestos, lead paint, and are attractive places for persons to illegally dump hazardous materials or for children to play. Demolition costs of these structures can be a significant part of many brownfields redevelopment projects. For example, an outdated 400,000 square-foot furniture manufacturing structure in one Wisconsin community has an estimated demolition cots of $1.5 million on a 3.6 acre property. Presently, the Commerce grant program is one of few programs with the ability to pay for demolition.

Local Governments have two critical needs for public funds:

Category 1: Short Term Brownfields Projects

First, local governments have a critical need for public funds to "jump start" new brownfields projects. That is to remove some of the economic obstacles in order to make the project more attractive to the private sector. These costs often include:

- conducting Phase I and II environmental assessments, particularly at petroleum properties, where Commerce and DNR grant and loan programs don't cover this important expense;
- removing underground tanks, barrels, liquids and other materials from property;
- demolishing structures and remove asbestos.

Category 2: Long-Term Needs

The second is for the for investigation and cleanup of brownfields projects. There are many brownfields that are unlikely to receive, or are not eligible for, current state funding and those properties contribute to neighborhood deterioration. Funds for the investigation and cleanup of the following types of properties is needed:

- properties for public use, such as green space;
- properties where the end use is likely commercial or industrial (i.e., there no current private sector job commitment), yet money is needed to make the property more economically viable for the private sector; and

- properties where the end use is unknown or unrelated to economic development, for example for housing.

Proposal

Create a new neighborhood revitalization grant program, available to local units of government including: municipalities, counties, towns, villages, redevelopment authorities, housing authorities, community development authorities, county utility districts, town sanitary districts, public inland lake protection and rehabilitation districts, or metropolitan sewage districts. Two types of grants should be available:

Category 1 - 20% or $1 million per year

- Phase 1 and 2 assessments
- Testing and removal of underground storage tanks
- Removal and analysis of above ground tanks, containers, barrels, or contaminated debris
- Demolition costs of less that $100,000

Category 2 - 80% or $4 million per year

- Demolition costs greater than $100,000
- Costs associated with investigation, analysis and monitoring of a brownfields facility or site to determine the existence and extent of actual or potential environmental pollution
- Costs associated with abating, removing, or containing environmental pollution at a brownfields facility or site
- Cost associated with restoring soil or groundwater at a brownfields facility or site

Guidelines for creating this neighborhood revitalization program include:

- properties must meet brownfields definition or be impacted by properties that meet the definition of brownfields;
- no local government can receive more than 15% ($750,000) of funds per year;
- local government cannot have caused the contamination;
- responsible party is not able to pay;
- local government must commit 20% of grant request in cash, in-kind services, or a combination of both;
- allow a flexible, streamlined schedule for soliciting and awarding grants, similar to the small community block grants or the DOT's TEA grants; and
- in the first biennial year, give the DNR authority to create emergency rules to implement this program; during the second year, provide DNR $5 million to distribute to local governments; after that, allocate $10 million per biennium.
- projects are not eligible or likely to receive other brownfields funding from the Petroleum Environmental Cleanup Fund Awards (PECFA) or the Brownfields Grant program.

Comments

Department of Commerce Comments: The Department does not agree with the creation of a new brownfields grant program. Rather, the Department supports the view that the framework for

successful brownfields redevelopment already exists through established grant and loan programs available through various state agencies. Rather than the creation of a new grant program, the enhancement of existing programs would accommodate a broad spectrum of brownfields projects, including projects with green space or public end uses. This is supported by the Department's actual experience with the Brownfields Grant Program as well as the following facts and insight:

- Enhance DNR Programs

  The $20 million DNR Municipal Land Recycling Loan Program was created to provide funding for projects such as green spaces and other public projects. No level of demand can be measured since the program has not been introduced. To assure that the needs are met for green space and public end use projects, the program could be refined to satisfy as many aspects of a project as possible. This includes a zero interest payment for Phase I and II environmental assessments, site investigations, as well as cleanup activities.

  The DNR's Stewardship Fund is dedicated to the development of public use projects such as urban green spaces. In order for the Stewardship Program to provide more funding to brownfields projects, a greater priority could be given to such projects that involve brownfields. Additionally, more Stewardship funds could be directed to brownfields and eligible project activities could be expanded to include actual remediation activities.

- Focus on Brownfields Grant Program

  At a time of budget constraints, a new grant program would require a revenue source, which could potentially take away existing or proposed increases in funding for the Brownfields Grant Program. The Brownfields Grant Program received 81 applications requesting $40 million in assistance. The Department was only able to meet the demands of 26 applicants for the first two funding cycles. Of the 26 projects awarded grants, 15 were given to municipalities for projects that will improve their communities. The 26 Brownfields Grants awarded by Commerce will revitalize 321 acres of contaminated brownfields, increase taxable property values by over $70 million, and create 2,000 new jobs.

- Undetermined Demand

  The need for a new program for public end uses or green spaces should be further studied, especially once the Municipal Land Recycling Loan program is available for use and can be assessed.

Nancy Frank, UW-Milwaukee School of Architecture and Urban Planning, Brownfields Study Group Member, Comments: Discussions in the Local Government and Financial subgroups identified significant gaps in current funding programs for brownfields. We agreed that a significant need exists for grant funds – not loans -- for the purposes described above. The Land Recycling Loan program, therefore, is not an answer now, nor would it address these gaps if it were revised to better address this need. The Department of Commerce opposes allowing the use of CDBG - BEBR program grants for public space end uses. The subgroups discussed, for example, the many riverfront brownfields which are appropriately being planned for open space uses. But currently, no grant program is available to fund these kinds of local redevelopment efforts. These two new grant programs are needed.

WMC's Comments: WMC questions the need for creating another grant program rather than looking at modifications to existing programs. We also question where the funding for this program would come from.

Type of Change: Statutory
Resources: $5 million in 1999-2001; $10 million per biennium thereafter. Two DNR staff to create, administer, and market program. Statutory direction to develop emergency rules is critical.

Chapter 3 – Brownfields LIABILITY PROTECTIONS

One of the main reasons why brownfields were ignored for many years was concern about potential environmental liability. Until recently, businesses, developers, lenders, and local governments have been afraid to get involved with brownfields because they were uncertain about their potential federal and state liability associated with the properties.

The State of Wisconsin has made significant progress in recent years to alleviate many of these liability concerns and to clarify a party's liability so that they can proceed to buy, sell, clean up and develop brownfields.

The Study Group reviewed and developed proposals to improve the liability protections and clarifications in Wisconsin. This chapter suggests ways to expand and improve these very critical protections.

Incentives proposed in this Chapter:

- ➢ **Modify "Voluntary Party" Definition**
- ➢ **Identify Funding Sources for Voluntary Party Cleanup**
- ➢ **Clarify/Streamline Solid Waste Requirements**
- ➢ **Create Interim Liability Protections During Voluntary Party Process**
- ➢ **Expand Voluntary Party Liability Exemption and the Liability Protections for Local Units of Government**
- ➢ **Ensure Certificate of Completion for Properties with Off-site Groundwater Contamination**
- ➢ **Use of Natural Attenuation at Voluntary Party Sites**

Issue: Modify the Definition of "Voluntary Party"

Background

The Legislature requested the Study Group to study the definition of "voluntary party" under section 292.15(l)(f), Wis. Stats. Over the last several years, Wisconsin has taken significant strides to implement an expansive program to clarify and, in some cases, limit the liability of certain persons. In 1994, the Legislature created a process where a purchaser - a person that did not cause the discharge - could elect to investigate and clean up a property and, at the conclusion of the process, receive a Certificate of Completion.

The Certificate provides liability relief if future problems arise concerning the pre-existing contamination on the property. In an effort to make the Certificate available to more parties willing to clean up, the Legislature expanded the eligibility for the Certificate of Completion in the 1997-99 Budget to include "voluntary parties."

A voluntary party includes any person, as long as they can demonstrate to the DNR that they did not "recklessly" or "intentionally" cause the release of the hazardous substance.

While the "reckless and intentional" eligibility was well intended, it has the potential to create problems, including:

- **discouraging participation:** to avoid being labeled "reckless" or "intentional," some property owners may not participate in the certification process;
- **workload concerns:** determining if the contamination was intentional or reckless is a time-consuming and difficult process for the DNR; and
- **legal challenges:** persons found to have "recklessly or intentionally" caused a release will likely challenge the determination in a contested case proceeding, which will use up valuable time and resources.

Proposal

The Brownfields initiative should maximize the remediation and reuse of property to generate new jobs, increase property tax and revitalize neighborhoods. To further this goal, the "reckless" and "intentional" provisions should be removed. Anyone who thoroughly investigates and remediates contaminated property should be eligible to obtain the Certificate of Completion under the Voluntary Party process and move forward with redevelopment.

Comments

Study Group Comments: One concern raised about expanding the eligibility provision is the granting of liability exemptions to "bad actors." Another related concern is that the state, using the Environmental Fund, will have to address remediation if additional contamination is discovered and no responsible parties are available to pay. The Study Group recognizes these concerns; however, they feel that this cost is offset by the increased property and income taxes, as well as the social benefits.

DNR Comments:

- In general, DNR staff agree that the "reckless and intentional" eligibility criteria will:
  - discourage persons from participating in the Voluntary Party process;
  - result in an increased workload for staff; and
  - may lead to legal challenges by persons whom the DNR determines to be ineligible for the program.

- DNR staff want to reiterate their position that the Department currently has the authority to pursue any applicable enforcement actions against any responsible party, regardless of whether they have entered the voluntary party liability exemption process, up until the time that they receive a certificate of completion provided for in s.292.15(2), Wis. Stats.

Sierra Club Comments: The clear principle should be: "polluters should pay." We agree with the report that the addition of the provisions of "Reckless and Intentional" in the 1997-99 state budget may have been well-intentioned but create potential problems. As stated in the draft report there are legitimate concerns that bad actors may receive liability protection and that taxpayers may be subject to an increased tax burden to pay for site cleanup that could have been charged to parties excused from liability too early in the site investigation and cleanup process.

We believe that the statute could be clearer by stating that if additional contamination is discovered, the state retains its authority to seek responsible parties to fund the cleanup in preference to shifting the burden to taxpayers.

WMC's Comments: WMC supports the expansion of the definition of "voluntary party." The current "reckless and intentional" exclusion discourages participation in the voluntary party process and needlessly increases staff's workload.

Type of Change: Statutory
Resources: If the "reckless and intentional" eligibility criteria were eliminated, more parties would be likely to enter properties into the liability exemption process. The DNR would need authorization to hire three new regional project managers to review these reports.

Issue: Identify Potential Sources of Funding to Cover Any Future Cleanup Costs Associated with Expanding the Eligibility of the Voluntary Party Process

Background

The state Legislature requested that the DNR, as part of this Brownfields Study Group:

"Identify potential sources of funding for brownfields cleanups for which this state becomes responsible because of the expansion of section 292.15 of the statute, as affected by this act, to cover persons who did not intentionally or recklessly cause the release of a hazardous substance."

In the 1997-1999 state budget the Legislature expanded the eligibility for the voluntary party liability exemption (VPLE) to include persons who did not "recklessly or intentionally" cause a discharge.

This statutory change went into effect on July 1, 1998. Previously, only persons who did not cause a release of a hazardous substance on the property were eligible for the exemption.

Proposal

The Brownfields Study Group recognizes that it is difficult to anticipate the financial impact of the Legislature adopting the "reckless or intentional" eligibility criteria, since it went into effect on July 1, 1998.

To address this concern, the Brownfields Study Group recommends, in conjunction with its biennial budget submittal to the Department of Administration, that the DNR submit a status report to the governor, the Legislature, and the Department of Administration. This status report would include the following information:

- number of active sites in the Voluntary Party Liability Exemption process;
- number of Certificates of Completion that have been issued;
- number of sites where a remedial option has failed or where additional contamination was found after the Certificate of Completion was issued;
- number of sites that were identified as priorities to be addressed by the DNR using the Environmental Fund, and any known or estimated costs of responding to these sites; and
- number and monetary value of environmental insurance claims filed on sites that have received a Certificate of Completion.

Comments

WMC's Comments: WMC supports the study proposed in this section. Additional information is needed to determine if funding is even an issue that needs to be addressed.

Type of Change: Administrative
Resources: None

Issue: Clarify and Streamline Solid Waste Requirements to Facilitate Redevelopment

Background

One of the objectives of the Brownfields Study Group, as directed by the Legislature, is to study the means by which the state can increase the number of brownfields cleaned up and redeveloped. This includes looking at the effectiveness of existing laws concerning the redevelopment of brownfields.

One of the chief issues that was identified by external stakeholders as part of the Brownfields Study Group's efforts is the challenge of dealing with solid waste statutes and rules when cleaning up and redeveloping a brownfields property. The Brownfields Study Group identified a number of site-specific issues pertaining to how solid waste issues created "challenges" to redeveloping brownfields. Those site-specific issues can be summarized into the following four general concerns:

- **low marketability** or negative image of properties labeled as "landfills;"
- **high transactional costs** associated with solid waste requirements;
- concerns over the **long-term liability** at solid wastes sites; and
- **perceived duplication of effort** between the DNR's Waste Management and Remediation & Redevelopment programs.

Proposal

After considering these problems and issues, the Study Group has the following recommendations:

- Further clarify the roles and responsibilities for the cleanup of contamination from solid wastes within the DNR utilizing the principles established in the September 1995 Advisory Group Report entitled: "Strategic Direction and Organization of the Remediation and Redevelopment Program." The Bureau for Remediation and Redevelopment (RR) was established to be the single entity to review and administer all DNR cleanup efforts of contaminated sites. In the 1995 report, the advisory group proposed a series of recommendations so that the Remediation and Redevelopment Bureau would fully embrace the concept of remediating contaminated lands for beneficial reuse.

The 1995 report established the basic operating principles for the RR Program. With respect to solid waste issues, the report states that the RR program is responsible for overseeing cleanup activities at closed solid waste landfills or other closed solid waste facilities that were previously addressed by solid waste management program staff . To further clarify the two programs' responsibilities, the Study Group agrees with the following principles:

1. The cleanup of active, licensed or approved landfills or other active, licensed or approved solid waste facilities are overseen by the Waste Management (WM) program. This also includes cleanup required at closed sites which are adjacent to active solid waste facilities.

2. The cleanup of closed landfills or other closed solid waste facilities are overseen by the RR program. It is recognized that existing solid waste approvals or administrative orders issued by the WM program remain in effect. However, WM and RR will work with the responsible party on how those existing requirements fit or may be modified by the cleanup action. Any changes will be effectively documented to facilitate the implementation of the cleanup action.
3. Closed, previously approved or licensed landfills or solid waste facilities with completed cleanups are the responsibility of the WM program for long-term care requirements (e.g. monitoring of groundwater, sampling of leachate, or maintenance of cap).
4. The cleanup of hazardous substances (spills) that exist within media considered to be a solid waste (e.g. foundry sand) are overseen by the RR program. The generation of solid waste occurring during investigation, remediation or post remediation activities are overseen by the WM program unless the activity is exempt under NR 718.

The four principles listed above are the base operating principles for clean up actions. The Department may continue to exercise its regulatory authority under Ch. 289 Wis. Stats. relating to solid waste facilities, except to the extent modified by Ch. 291 Wis. Stats. The allocation of responsibility between the RR program and the WM program does not affect the applicability of Ch. 289, Wis. Stats. or any existing order, exemption, or plan approval issued under that chapter.

These four clarifying principles will help to more fully implement the 1995 report. The WM and RR program share common goals with respect to addressing solid waste issues at brownfields sites. The concept of redevelopment of land to put it back into productive use is a primary goal of the agency and is encouraged within the context of protecting human health and the environment. The Department acknowledges that in some cases, there has been confusion on the part of external customers. The Department needs to reduce or eliminate this confusion by providing clear and concise guidance and appropriate rule changes to reflect the principles established in this section of the Brownfields Study Group Report. The following concepts will also be considered when the Department reviews its process to address the cleanup and redevelopment of brownfields:

- redevelopment of land in compliance with all environmental and health standards is an agency priority;
- local and site specific conditions need to be recognized when selecting remedies and applying all appropriate standards including local land use patterns and concerns;
- develop a process for screening out low risk sites with little or no resources committed by either program;
- a single point of contact for the external customer(s) needs to be established and maintained;
- program expertise and cross program integration between the Department's regional staff should be applied when site conditions warrant;
- institutional controls, or other means of providing notice, need to be considered when selecting remedies where waste or contamination remains; and
- a performance-based approach to site investigation and remediation will be maintained.

- The Study Group recommends that several "Site Development Teams" be created to collect data on real world experiences. The purpose of these teams would be to further enhance the agency's approach to cleanups and solid waste issues; to collect more data on the process; and to provide a better understanding for the external customers who are involved with a site of some of the issues that the Department faces. The Department should work with

interested external stakeholders to specifically define/ select “pilots”. The basic aspects of the pilots for “Site Development Teams” are as follows:

Several pilot "site development teams" should be created. Each of the teams would consist of representatives from RR, WM, the appropriate municipal representatives, potential developers, potential financiers, Department of Commerce, and others as appropriate (i.e. Community Financial Assistance, Watershed, etc.). The team would provide input into the characterization of the site, regulatory requirements, determine appropriate roles of the members, serve as a steering committee to guide the project through the regulatory/development process, and identify and pursue appropriate technical and financial assistance tools. The overall goal would be to process efficiently an economically and socially appropriate redevelopment project without harming human health or the environment. The teams would address several sites that were determined to be complex in nature, with a number of the potential obstacles identified above. This process is intended to provide more flexibility to deal with the specific project issues. It would provide data for future recommendations, and address the obstacles identified by the Study Group by:

- educating interested parties as to the specific characteristics of a given site - they would have the facts about the waste contained at the site and any associated limitations/liabilities;
- identifying solid waste and contaminated site requirements and providing technical assistance through both processes - minimizing costs;
- identifying long-term liability issues and methods to minimize them;
- eliminating duplication between WM and RR by defining appropriate roles for each in relation to the characteristics of a site. The synergies possible through working together in the team would result in more creative and cost-effective solutions.

This approach emphasizes a partnership between DNR, Dept. of Commerce , local government and the private sector to redevelop brownfields sites containing waste. Development at specific sites could be structured in a manner appropriate to local socio-economic needs, and physical site characteristics, while identifying and minimizing potential adverse environmental and health effects.

- The Study Group also recommends that the Department, in accordance with the operating principles stated earlier, evaluate and improve processes related to how solid waste requirements are implemented during brownfields redevelopment and resulting improvements should be implemented. The Brownfields Study Group recommends that the RR Bureau and the WM Bureau, working with internal and external parties, implement the following process to improve their coordination:

December 1998 to April 1999

- Submit a pink sheet to the Natural Resources Board outlining this effort.
- Establish process to implement Site Development Team concept.
- Establish an internal DNR team of regional/central office RR & Waste staff/managers to develop charges and deliverables.
- Establish an external advisory group to work with the internal DNR team.
- Review processes in NR 500 & 700, related guidances, and standard operating procedures pertaining to low hazard exemptions and exemptions for building on abandoned landfills.

- Evaluate potential issues that may still need to be addressed (i.e. enforcement for "dumped" wastes, municipal waste landfills, standards for evaluating fill/foundry sand areas, standards for determining direct contact concerns, potential code revisions).
- Define areas where "improved" systems can be implemented now.
- Identify types of public outreach materials - create plan to develop and distribute materials that will be useful to developers, lenders, etc.
- Introduce concepts to staff in both programs early in the process.

December 1998 - June 1999

- Share and discuss draft processes, recommendations, and public outreach plan with external partners (Brownfields Study Group; others).
- Define the remaining areas of concern and make modifications to draft processes.
- Propose rule changes.
- Begin process to implement agreed upon changes.
- Present proposal to external group for comment on the transfer of responsibilities to the RR Bureau and how that transfer will be adequately staffed.
- Training for internal and external parties.
- Develop pink sheet for guidance, policy, or rule changes to both NR 500 and/or 700.

July 1999

- Develop detailed implementation plan for "improved" systems.
- Train/discuss implementation plan.
- Continue the rule modification process with the internal team and Brownfields Study Group.

Comments

DNR Comments: DNR staff from both Waste Management and the Remediation and Redevelopment programs have reviewed the Study Group proposal and agree with the process proposed.

WMC's Comments: WMC supports this proposal. In general, the Department should consolidate remediation activities in one Bureau – the Bureau of Remediation and Redevelopment

Type of Change: Policy, Regulatory, Administrative
Resources: Based upon the outcome of the guidance and rule review, implementation of the Site Development Teams and any related issues, a workload analysis for all programs should be undertaken to address resource needs resulting from this evaluation. If the analysis shows additional resources are needed to implement these recommendations, the Study Group supports new staff and the financial resources to streamline the redevelopment process.

Issue: Create Interim Liability Protections During the Voluntary Party Liability Exemption Process

Background

Under the current Voluntary Party Liability Exemption (VPLE) process (s.292.15, Wis. Stats.), the DNR provides a party with a Certificate of Completion after they have successfully remediated the property. However, the liability exemption does not provide "interim" liability protection during the period between the approval of the investigation/remediation plan and the issuance of a Certificate of Completion.

Voluntary parties are not protected from liability by the State of Wisconsin for additional contamination that may be discovered during the remediation. Some people believe that this lack of interim protection creates an impediment for redevelopment in cases where the remediation takes several years to complete. Others believe that this "interim" liability protection currently is being addressed in the following manner by:

- municipalities entering into agreements with purchasers to take on that liability prior to receiving the VPLE;
- either the buyer or the seller of the property agree to take on that liability; or
- a person securing a private environmental insurance policy to cover that period of time.

Proposal

The VPLE process, s.292.15, Wis. Stats., should be modified to expressly provide interim liability protection for qualified parties where the DNR has approved a site investigation and those parties have agreed to implement a remediation approved by the Department. This interim protection would protect the party from liability for any subsurface conditions that were not identified in the approved site investigation report, but are discovered prior to the time the required remediation is completed.

To receive the interim protection, a party would need to enter into a contract or negotiated agreement with the DNR to implement the remediation. This interim protection would not release voluntary parties from their responsibility to meet standards if the chosen remediation technique fails. This interim protection would certify that the site investigation is complete, but would not certify that the chosen remediation will meet the remediation objectives.

If this interim protection is provided to parties, the state Environmental Fund would face greater risk because the state would be responsible for additional contamination found at sites after the remedial action plan is approved, but before the remediation is completed. To eliminate this risk, parties requesting this interim exemption would be required to obtain a standard insurance policy for the interim period naming the voluntary party and the State of Wisconsin as the insured. To receive the liability exemption after the DNR approval of the investigation and remedial action plan, participants would have to demonstrate that they have the state approved standard insurance policy. The insured will pay for this policy. Before this change is implemented, the availability of this type of environmental insurance and the feasibility of the requirement should be investigated.

Comments

DNR Comments: DNR staff expressed the following concerns regarding the proposal.

- Workload **– e**ntering into contracts to complete remedial activities and approving insurance policies would significantly increase the DNR's workload.
- Privatization – voluntary parties are currently able to obtain insurance to cover the costs of unanticipated remedial actions. Staff believes that it is important to support private sector solutions to as many brownfields issues as possible. The state may be stepping in and taking over a role that the private sector can and should fulfill, by way of providing environmental insurance.
- Thoroughness of Site Investigation – the availability of interim protection may increase the pressure on DNR staff to approve investigations and grant exemptions without adequate information. In turn, it may result in the DNR requiring more investigative work than if the liability protection came at the conclusion of the cleanup.

Sierra Club Comments: The Wisconsin Land Recycling Law grants municipalities special liability limitations and rights to facilitate the cleanup of brownfields where they are not the polluter, the direct source of the pollution. The waiver of liability is in exchange for actual cleanup. The original intent of the law was to shield municipalities from additional liability once cleanup is achieved. The proposal to change this to an earlier stage in the cleanup process flies in the face of real world experience which shows that occasionally site investigations are incomplete or inaccurate in identifying the full extent and seriousness of contamination. Therefore, it is not appropriate to grant liability protection until agreed upon cleanup is completed.

WMC's Comments: WMC supports their proposal but does not agree that DNR needs five additional staff to implement this proposal.

Type of Change: Statutory and Regulatory
Resources: The DNR would require 5 additional staff to implement this change. The DNR would need to:

- investigate the availability of insurance;
- develop rules to approve the insurance policies; and
- develop site-specific contracts to complete remediation for persons who wish to receive this interim protection.

Issue: Expand the Voluntary Party Liability Exemption and the Liability Protections for Local Units of Government

Background

The Voluntary Party Liability Exemption (s.292.15, Wis. Stats.) provides Voluntary Parties who clean up contaminated property an exemption from environmental liability under sections of the Spill, Hazardous and Solid Waste laws.

However, Voluntary Parties who receive a Certificate of Completion are not exempt from liability from the DNR when contamination migrates off-site (e.g., to an adjacent property) because the exemption only applies to the property where the hazardous substance is located. Similarly, Local Units of Government who receive exemptions from the Spill Law when they acquire property involuntarily (s.292.11(9)(e)1m) are not clearly exempt from the Spill Law if contamination migrates off-site to another property.

This is because the statute is unclear whether the current LUG exemption applies to the property itself or anything impacted by the property.

Proposals

- To encourage more parties to clean up and redevelop brownfields, the liability exemption provided in s.292.15(2)(a), Wis. Stats., should be changed to clearly exempt voluntary parties from liability if the contamination migrates to an off-site property. After the Certificate of Completion has been issued, voluntary parties should be protected the possibility that the DNR could require additional remedial actions (under the Spill Law) for contamination originating from the property if it impacts an off-site property.

  To accomplish this, s.292.15(2)(a), Wis. Stats., should be changed as follows:

  "Except as provided in sub. (6) or (7), a voluntary party is exempt from .... with respect to the existence of a hazardous substance <u>located</u> on <u>or originating from</u> the property, if all of the following occur....

- To encourage more Local Units of Government to acquire and recycle brownfields, the LUG exemption should be changed to clearly exempt LUGs who acquire property by one of the mechanisms listed in s.292.11(9)(e)1m, Wis. Stats.(blight elimination, tax delinquency, etc.), from liability if the contamination migrates off-site and impacts another property.

  To accomplish this, s.292.11(9)(e)1m, Wis. Stats., should be amended as follows:
  "A local governmental unit is exempt from subs. (3), (4) and (7)(b) and (c) with respect to <u>the existence of hazardous substances located on or originating from</u> property acquired by the local governmental unit if any of the following applies:"

- To further encourage Local Units of Government to acquire and recycle brownfields, and to provide consistency in state policy with respect to civil immunity protection provided to LUGs who acquire contaminated properties one of the mechanisms listed in s.292.11(9)(e)1m , Wis.

Stats., the immunity provisions in s.292.26, Wis. Stats., should be extended to cover such acquisitions.

To accomplish this, s.292.26(2), Wis. Stats., should be amended as follows to read as follows: "Except as provided in sub. (3), a local governmental unit is immune from civil liability related to the discharge of a hazardous substance on or from the property if any of the following applies:

(a) The local governmental unit acquired the property through tax delinquency proceedings or as the result of an order by a bankruptcy court.
(b) The local governmental unit acquired the property from a local governmental unit that acquired the property under a method described in par. (a)
(c) The local governmental unit acquired the property through condemnation or other proceeding under Ch. 32, Wis. Stats.
(d) The local governmental unit acquired the property for the purpose of slum clearance or blight elimination."

Comments

DNR Comments: The third proposal listed above would deprive a third party of the right to seek a remedy for damages to their property caused by contamination migrating onto their property from the source property. It could be found to be an unlawful attempt to deprive the third party of his or her property without compensation.

Study Group Comments: Many members of the Study Group expressed concern over the third bullet in this proposal. These concerns mirrored the DNR's comments.

Bruce Keyes, Foley and Lardner, Brownfields Study Group Member, Comments: The first two proposals (a and b) address situations where the municipality has little or no choice regarding property to be acquired. In some instances this could be said of acquiring property for blight elimination or condemnation. However, the local unit of government is likely to have a greater degree of free will in selecting to acquire properties for redevelopment and acquisition through condemnation or blight elimination. Consequently, while it is in the public interest to protect the public coffers, in balance I believe that the local unit of government should, in these cases, be held to the same responsibility as private parties.

Type of Change: Statutory
Resources: None

Issue: Ensure Availability of a Full Certificate of Completion for Properties Impacted with Off-site Groundwater Contamination

Background

Under s.292.13, Wis. Stats., individuals are not responsible for cleaning up contamination that is coming on to their property from an off-site source. As a result, a voluntary party in the VPLE process can choose to not clean up contamination found on their property coming from off-site sources.

If the voluntary party chooses to clean up all the contamination coming from on-site sources and not the contamination coming from off-site, the law (s.292.15, Wis. Stats.) does not allow them to receive a Certificate of Completion because they have not cleaned up the property completely. Under current law, voluntary parties have a right to obtain an Off-site Discharge Liability Exemption (s.292.13, Stats) for the groundwater contamination caused by an off-site source and a partial Certificate of Completion under s.292.15(2)(am), Wis. Stats.

The Study Group believes that a full Certificate of Completion, as opposed to a partial certificate and an off-site exemption, provides a more valuable incentive for parties to purchase and redevelop brownfields.

Proposal

Amend s.292.15, Wis. Stats., to allow the DNR to issue full certificates of completion at sites with contamination coming from off-site, provided that the voluntary party meets the conditions of the off-site exemption under s.292.13, Wis. Stats., for the off-site groundwater contamination present on the site and continues to comply with all of the requirements contained in s.292.13, Wis. Stats.

To accomplish this proposal, an additional subsection could be created in s.292.15(2), Wis. Stats., that allows for the issuance of a full Certificate of Completion when a voluntary party otherwise satisfies all of the work necessary to obtain a full Certificate of Completion but has been prevented from obtaining that full Certificate of Completion solely because of the existence of groundwater contamination originating from an off-site source. The voluntary party would have to obtain a written off-site exemption for the groundwater contamination under s.292.13(1) and (3), Wis. Stats. and comply with all of the requirements upon which that exemption is conditioned.

<u>Drafting Instructions</u>

1. Create a subsection in s.292.15(2), Wis. Stats., that states that in the event that a voluntary party has complied with all of the requirements for obtaining a certificate of completion for a property under s.292.15(2)(a), Wis. Stats., except with respect to the existence of a hazardous substance in the groundwater on the property that originated from a source on property that is not possessed or controlled by the voluntary party, the voluntary party may obtain a certificate of completion for the property under s.292.15(2)(a), Wis. Stats., if the voluntary party obtains an off-site liability exemption for the existence of all hazardous substances in the groundwater on the property under s.292.13, Wis. Stats., and continues to comply with the requirements in s.292.13, Wis. Stats., for obtaining the exemption.

2. Amend s.292.15(3), Wis. Stats., so that certificates of completion that are obtained with an off-site exemption as described above are applicable to successors and assigns so long as they continue to comply with the requirements for obtaining the off-site exemption contained in s.292.13, Wis. Stats.

Comments

WMC's Comments: WMC supports this proposal.

Type of Change: Statutory
Resources: None

Issue: Use of Natural Attenuation at Voluntary Party Sites

Background

Over the past few months, DNR has received a number of inquiries about whether a participant in the "Voluntary Party Liability Exemption" (VPLE) program, s.292.15, Wis. Stats., could receive the exemption (a Certificate of Completion), before Ch. NR 140 groundwater standards are met, at sites where natural attenuation of groundwater is proposed as a final remedy.

The DNR believes that it does not have the authority under s.292.15, Wis. Stats., to issue Certificates of Completion before Ch. NR 140 groundwater standards are met. The only authority it presently has is to issue a letter of assurance to the voluntary party clarifying that it will receive the Certificate of Completion when the natural attenuation remedy succeeds in bringing the groundwater back into compliance with Ch. NR 140.

The issuance of Certificates of Completion before Ch. NR 140 standards are met at sites where natural attenuation will bring groundwater into compliance with Ch. NR 140 standards within a reasonable period of time will promote the redevelopment objectives that the VPLE was intended to achieve.

However, the statute does not currently address the issue of how cleanups of sites with failed natural attenuation remedies would be funded. This concern is especially compelling because the use of natural attenuation as a remedy, unlike conventional environmental remedies, is a relatively new provision in the Ch. NR 700 administrative rule series.

This raises the concern that the state may take on a potentially expensive responsibility to clean up groundwater at those sites where natural attenuation fails after a Certificate of Completion is issued.

Proposal

Amend s.292.15, Wis. Stats., to allow Certificates of Completion to be issued before Ch. NR 140 standards are met at sites where natural attenuation is used as a final remedy, consistent with Ch. NR 726, Wis. Admin. Code, conditional closure requirements. In addition, create a provision that requires a voluntary party to obtain insurance that would cover the costs of remediation in the event that the natural attenuation remedy fails.

The DNR will work with the Department of Administration and interested parties to develop rules that specify the type of insurance that would be most feasible. The two most likely methods of insuring the success of natural attenuation remedies at VPLE sites are:

1. Privately obtained insurance: The voluntary party would have to obtain insurance to cover the costs of any failures of the natural attenuation remedy and present proof of insurance with the request for the Certificate of Completion.

2. State-sponsored insurance: The state would negotiate a master contract with an insurer to cover all natural attenuation remedies at VPLE sites and issue the Certificate of Completion only after the voluntary party has paid the premium for coverage under that policy for the VPLE site.

The advantages and disadvantages of these options would be assessed during the rule-making process and the most appropriate, cost effective, and feasible option would be codified and implemented. In order to accomplish this effort in a timely manner, the DNR should also be authorized in the budget bill to develop these rules under its emergency rule-making authority.

Comments

Type of Change: Statutory, including authorization to develop rules under emergency rule-making authority.
Resources: DNR staffing needs will be dependent upon the insurance option selected.

Chapter 4 – Brownfields AREA-WIDE GROUNWATER ISSUES

One of the directives in the 1997-99 Budget provision that created the Brownfields Study Group was to:
"[s]tudy optional methods to clean up groundwater on a comprehensive, rather than property-by-property basis."

The overview, issues and proposals that follow are the result of the deliberations of the Area-wide Groundwater Cleanup Subcommittee and the full Brownfields Study Group.

Property owners, buyers, and lenders are reluctant to redevelop properties with real or perceived environmental contamination. Where there are a number of brownfields properties located in close proximity to each other, this problem is only exacerbated.

This concern can be especially problematic in urban areas, where contamination may extend over multiple parcels and even entire industrial corridors. Examples of such area-wide environmental contamination include:

- a single source contaminating multiple properties;
- multiple existing sources, known or unknown, that result in discrete or co-mingled groundwater plumes; or
- past material handling, landfilling, and disposal practices that, while not leaving distinct sources, contribute to overall groundwater and soil quality degradation.

Nevertheless, because of perceptions regarding legal liability, practicality, and lack of financial benefit, environmental remediation has historically been undertaken on a parcel-by-parcel basis.

Incentives proposed in this Chapter:

- ➢ **Create Financial and Environmental Incentives for Cleaning Up and Redeveloping Area-wide Brownfields Contamination**
- ➢ **Improve Information for Area-wide Environmental Contamination**
- ➢ **Provide Single Contact for Environmental Cleanup of an Entire Area**
- ➢ **Use of Natural Attenuation in Area-wide Groundwater Approaches and Consideration of Groundwater Use in Conducting Cleanups**
- ➢ **Clarify Uncertainty Regarding Establishment of Cleanup Objectives**

The Area-wide Groundwater Cleanup Subcommittee examined the feasibility of undertaking a more comprehensive, or area-wide, approach to help facilitate quicker and less costly cleanup, and redevelopment, of urban areas. Such cost savings and efficiencies can be achieved by combining investigation and remediation efforts into a unified, one-time, effort.

Briefly, the following issues were identified as potential impediments to area-wide groundwater cleanups (note that other issues identified by the subcommittee are addressed in separate proposals):

- existing regional and site specific hydrogeologic and analytical information is

not readily available to parties wishing to undertake an area-wide groundwater cleanup;

- there is no single contact person at the DNR to provide focus, strategy, and continuity to an area-wide cleanup effort;
- site characterization information for privately-held sites is generally unavailable;
- landowners are reluctant to collect environmental information due to fear of liability;
- there may be an uncertainty regarding the establishment of cleanup objectives across a given area;
- there is a lack of financial resources for initiating and implementing the process;
- there is a lack of financial incentive for landowners to participate;
- municipalities are likewise reluctant to take responsibility for groundwater contamination;
- it is difficult to segregate liability among interested parties;
- some landowners are reluctant to share costs, believing that they may be required to pay more than they rightfully should; and
- lack of understanding by, and communication to, the public concerning the goals and benefits of an area-wide groundwater cleanup effort can also impede the implementation of such an approach.

The above-identified issues were addressed by the subcommittee and the following five proposals were set forth.

1. Create a "Wisconsin Sustainable Urban Development Zone Program" program to deal with many of these issues in a comprehensive manner.
2. Make available the existing regional and site-specific environmental information that would be useful to a party attempting to clean up groundwater on an area-wide basis. This proposal embodies both a short-term effort to compile and make available the multitude of sources in some form of bibliography and contact list, and a long term effort to coordinate with other organizations on compiling a GIS system that contains this information.
3. Direct the DNR to assist any area-wide groundwater cleanup effort by providing a single point of contact at the agency to answer questions and, if necessary, oversee cleanup efforts.
4. Explore the possibility of adapting the natural attenuation rules in NR 700 so that they may be applied to an area-wide groundwater cleanup approach and consider groundwater use in establishing cleanup objectives.
5. Increase outreach efforts regarding the establishment of cleanup requirements and standards, including how risk-based corrective action (RBCA) is applied at cleanups.

Issue: Create Financial and Environmental Incentives for Cleaning Up and Redeveloping Area-wide Brownfields Contamination

Background

The Study Group was initially charged with developing a proposal to address the cleanup of area-wide groundwater contamination. However, it became apparent that – because soil and groundwater contamination are oftentimes interrelated, and because negative perceptions about environmental liability are not limited to groundwater – the strategies for addressing groundwater contamination are in many instances equally applicable to area-wide soil contamination concerns.

The Study Group identified a number of issues that may impede the implementation of an area-wide environmental cleanup strategy. The following proposal represents some recognition that a comprehensive plan for addressing area-wide groundwater contamination is preferable to a piecemeal, issue-by-issue approach to the problem. It was designed to accommodate both public and private initiatives to address area-wide groundwater concerns.

Proposal: Create a Wisconsin Sustainable Urban Development Zone (SUDZ) Program
Purpose: The purpose of the Sustainable Urban Development Zone program is to create a comprehensive set of financial incentives to promote the clean up and redevelopment of certain brownfields *areas* in a community. The Brownfields Study Group believes that there are certain geographic areas in this state where economies of scale could be achieved if we apply our existing financial incentives to *brownfields areas*, rather than a specific property. In doing so, the State of Wisconsin hopes to demonstrate the fundamental connection between environmental protection and economic prosperity, by creating the Sustainable Urban Development Zone (SUDZ) program to promote community well being. The following are recommended features of the SUDZ.

A. Criteria for Establishing a Sustainable Urban Development Zone. A local unit of government (LUG) - municipalities, redevelopment or community development authorities, public bodies, or housing authorities – may request that DNR designate the following types of brownfields properties as a SUDZ.

1. An area nominated to the DNR must meet two or more of the following conditions to be eligible for selection as a SUDZ:

- two or more properties adjacent to, or in close proximity to, each other;
- the nominated area represents either a significant reduction in tax valuation or a significant decline in the economic base of that area, such as plant closings, job losses, or other impacts;
- known or suspected environmental conditions have been a significant factor in slowing or preventing redevelopment or reuse of those properties; or
- may represent an area-wide groundwater contamination problem.

2. Other conditions on the designation of areas as SUDZs:

- DNR may not designate more than 10 areas as SUDZs;

- maximum life of the SUDZ is 30 years;
- the local unit of government has provided adequate public notice to property owners in area nominated to be in SUDZ;
- the local unit of government has agreed to establish, maintain and monitor a public information repository; and
- property owners or persons conducting an investigation and cleanup within the SUDZ, which receive state funds or tax credits, are to provide updated Ch. NR 700 reports to the public information repository on a regular basis.

3. Criteria for selecting a SUDZ among eligible projects would be:

- commitment of the local unit of government to the SUDZ project, including the local government's financial commitment and innovativeness of the local government's role in the project (20%);
- positive impact of the project on the environment, including increasing the public's access and use of green space (30%);
- ability of project to promote economic development, both direct and indirect, in the zone and surrounding areas (30%); and
- overall ability of the proposed project to promote and achieve sustainable development, including the integration of environmental and economic benefits in the zone (20%).

B. Tools for Addressing Properties within a SUDZ

1. Agreements with DNR for Assessment and Cleanup of a SUDZ

Modify the "negotiated agreement" provision in s.292.11(7)(d)1., Wis. Stats., to allow the DNR to enter into an agreement with one or more of the following entities, in addition to those parties that possess or control a hazardous substance discharge:

- a Local Unit of Government (LUG) to address the contamination on the LUG's properties within the SUDZ;
- a LUG on behalf of other property owners within the SUDZ; and
- a Business Improvement District (BID), created by the municipality on behalf of the property owners in the SUDZ (Sec. 66.608, Wis. Stats.).

The purpose of such an agreement would be to establish a schedule for the investigation and cleanup of non-emergency actions, as currently allowed by state law (see s.292.11(7)(d)1., Wis. Stats.). In this agreement, the LUG or the BID may assume "control"- and thus responsibility - for the investigation and/or cleanup of certain properties or areas of contamination (e.g., groundwater) for the purpose of clarifying cleanup responsibilities, even though they did not cause the contamination or do not currently "possess" the hazardous substance discharge. The DNR may recognize in the negotiated agreement that the LUG or BID is releasing parties from future liability, if:

- the DNR is satisfied that a LUG or BID has implemented or proposes to implement a satisfactory remedial action plan; and
- the LUG or BID has in place acceptable financial mechanisms (e.g., a TIF, funds negotiated from property owners, loans, grants, etc.) for addressing long-term cleanup, as well as operation and maintenance costs, associated with environmental conditions for which the negotiated agreement addresses.

2. Funding for Assessments, Investigations and Cleanups

a. Clean Water Fund (federal repayment portion):

- appropriate $5 million per year in loans for SUD zones;
- modify existing Land Recycling Loan Program to allow a local unit of government with an approved SUDZ to be eligible for loans of up to $1,000,000 per year; these loans would be for the area encompassing the SUDZ, rather than for a specific property or facility;
- terms: same as LR Loans, as proposed in the Land Recycling Loan Issue in Chapter 2; and
- LUGs would be able to use the state loans to:
  - create a revolving loan fund for private parties;
  - for LUGs to conduct their own assessments and cleanups; or
  - both.

b. Environmental Remediation Tax Incremental Financing (ER TIF) District:

- modify ER TIF (See Chapter 2) statute so that an ER TIF can be created on multiple properties within the SUDZ; ensure that the ER TIF(s) are part of the same overlying taxing jurisdictions; in other words, allow ER TIF to be used on properties where the local unit of government did not directly spend money, but where money spent by the LUG benefits all properties in the SUDZ; and
- ensure other modifications to ER TIF proposed by Brownfields Study Report are adopted.

c. State Tax Credit for Remediation Costs:

- allow for a 50% state income tax credits for investigation and cleanup of properties within SUDZ.

Conditions on Receiving Financial Incentives:

- property owners or those entering into agreements with the DNR to conduct an environmental response action must commence the investigation of the property within three years of the creation of the SUDZ to be eligible for state tax credits and land recycling loans;
- new property owners who purchase property after creation of the SUDZ must commence investigation within 24 months of acquisition to be eligible for tax credits and loans; and
- the remedial action plan must be approved by the DNR within 5 years of commencing the site investigation in order to remain eligible for these financial incentives.

C. Community Education/Notification Components

1. DNR, in cooperation with local governments, should develop resource materials and presentations for citizens and businesses in the vicinity of area-wide cleanups that describe the process and overall benefits to the environment of a SUDZ.

2. Effectively inform interested persons and the public of process and overall benefits of the SUDZ (please see public repository proposal as part of this effort).

a. Improve quality of information available to the media and public agencies.
b. Encourage development of public communication strategies in the initial planning of area-wide groundwater cleanup efforts.

Comments

DNR Drinking Water and Groundwater Comments (please see Appendix D for full memorandum): Reflecting on our last subcommittee meeting it became clear that the proposal describing the Wisconsin Sustainable Urban Development Zone Programs (SUDZs) will undoubtedly be a great product of this subcommittee. Additional fine tuning to the SUDZ concept needs to identify a strong emphasis on groundwater cleanup, not just on agreements and funding. There needs to be a strong commitment to clean up groundwater and to educate and communicate with responsible parties, lenders and realtors about the time and cost savings when multiple parties work together.

Shifting gears, somewhere in the overall report, providing that it fits within the charge of the larger committee, the report should address ways and means to clean up groundwater and maximize efficiencies on an area-wide basis, discussing the benefits of shared resources of an area-wide cleanup.

For example, an entire industrial corridor could join forces to monopolize on economies of scale, reduce duplication, and simplify the process for all parties involved. If multiple parties coordinate and cooperate, everything from site investigations, monitoring wells, remedial actions, capitol costs, O&M costs, reports, reviews, consultants, attorneys, regulatory activities, etc., can be reduced and optimized to save time, cost and effort. Drilling activities, laboratory services, equipment purchases, sampling activities, etc., could be bundled and coordinated to further maximize efficiencies. The benefits of cooperation and shared resources need to be clearly articulated to all parties involved.

Additional DNR Comments: The issues having to do with funding environmental assessments with CWFP repayments have been commented on in the Land Recycling Loan Program in Chapter 2. The Study Group's definition of a LUG lists a number of governmental units that do not possess the general obligation bonding authority to secure a LRLP loan. Comments in Chapter 2 also address concerns with loans to these types of entities.

Since this proposal involves creating and empowering a new type of governmental entity, a Wisconsin Sustainable Urban Development Zone Program, or SUDZ, there are a number of enabling issues that need to be decided, including organizational and financial structures. Loans from the State Revolving Fund (SRF) to SUDZ projects should be administered under the existing LRLP unless there is a compelling reason not to do so.

Given the number of shortcomings associated with the use of SRF funds for this program, other non-Environmental Improvement Fund sources of funds should be investigated. Other sources might not have the constraints of the IRS, state constitution, federal requirements, and state procedures that accompany use of the SRF funds.

DOR Staff Comments:

General comments:

- specify a length of time for Sustainable Urban Development Zone; and
- TIF cannot be used as a stop-loss insurance program for financing assessment and cleanup; pre-authorization of the TIF before costs are known is unlikely.

Tax credits:

- credits should be for income or franchise tax;
- credits should be non-refundable;
- identify entities that would qualify (i.e. corporation, partnership, subchapt. S corp.); and
- set a minimum level of spending to qualify for tax credits.

Department of Commerce Comments: the Department of Commerce is not supportive of the proposed Sustainable Urban Development Zone for the following reasons:

- The goals of the program are not clearly outlined. Environmental remediation is only one part of economic revitalization. If this proposed program is intended to be a viable and comprehensive economic revitalization program, then it must be much broader, therefore located within the Department of Commerce. If it is intended to be a groundwater cleanup program, then it must be renamed to something more appropriately descriptive.

- A tax credit for environmental remediation available only in this zone could create confusion over where and when it is available and where and when the development zone environmental remediation credit is available.

- The Brownfields Grant Program already gives a priority to projects that are located in areas of economic distress, located in a CDZ or EDZ, and for projects which have significant environmental problems, such as impacts to groundwater. Since the Grant Program already gives a priority to projects that may revitalize an area and it provides priorities to many other situations, it would be unnecessary to create additional priorities.

The City of Milwaukee's comments for this issue are found in Appendix A.

Type of Change: Statutory
Resources: 3 DNR FTE – two program staff and one attorney. Authority to create emergency rules.

Issue: Improve Information for Area-wide Environmental Characterization

Background

Implementation of area-wide investigation and cleanup can be enhanced by the availability of existing background information regarding: 1) the area's physical characteristics (i.e., hydrogeology, natural background water quality) and 2) the nature and distribution of existing contamination.

Information regarding an area's physical characteristics may be available from the following sources:

- regional hydrogeologic framework studies/reports – U.S. Geological Service (USGS), Wisconsin Geological and Natural History Survey (WGNHS), U.S. EPA;
- regional Data Collection/Monitoring Networks – USGS, WGNHS, DNR, U.S. EPA;
- local framework studies – Southeast Wisconsin Regional Planning Commission (SWRPC), counties;
- area-specific studies – universities, research entities, USGS, WGNHS;
- DNR (e.g. spill reports, remediation and redevelopment case files, and the Solid Waste Bureau's Groundwater/ Environmental Monitoring System, Gems); and
- site-specific contamination investigations - private and public parties (e.g. WDNR, EPA, Wisconsin DOT and DATCP).

Regional information is often useful and important for a general understanding of an area's/site's physical setting, but generally is not of sufficient detail to adequately characterize an area/site with respect to implementing a cleanup activity.

For example, water level or water quality data from the USGS/WGNHS/DNR monitoring networks will not likely provide information directly applicable to an area/site contamination study. Local framework studies or area-specific studies potentially can provide greater detail and more useful information.

In fact, an area-specific study commissioned by a regional planning commission or municipal or county government for the purpose of characterizing a specific area of interest would be a cost-effective way to obtain information that would enhance implementation of an area-wide cleanup.

Physical setting information from multiple site-specific contamination investigations may allow for characterization of a larger area, but the inconsistency in data quality and incompleteness of information for many parcels pose potentially significant limitations. One limitation in obtaining the above-discussed information is the need to acquire information from many different sources and in many different formats. Creation and maintenance of a geographic information system (GIS) would potentially enhance the accessibility to such information. Moreover, developers would be able to do a "quick and dirty" assessment of potential environmental issues instead of making blanket assumptions based on potentially inaccurate perceptions.

Proposal

Two proposals, to address information needs in both the short term and long term, are presented.

Proposal #1: Create a comprehensive bibliography of available information on an appropriate geographic basis that identifies all sources of general and site-specific groundwater information.

Comments

Type of Change: Statutory
Resources: Additional funding for either WGNHS or DNR.

Proposal #2: Work with existing and newly-created GIS initiatives (e.g. SDWA initiative) to include physical and chemical groundwater and soil data in those databases. This is a long-term, labor intensive and costly strategy that could only be accomplished in cooperation with other interested agencies and organizations (e.g.- EPA, DATCP, WI DOT, USGS, WGNHS, etc.…). Also, please see the GIS proposal in Chapter 5.

Comments

WMC's Comments: WMC supports the proposals to obtain better groundwater related information, but does not believe that resources should be directed from cleanup efforts to fund these activities.

Type of Change: Statutory, Policy
Resources: Additional funding/positions for DNR Bureau of Drinking Water and Groundwater to cooperate/coordinate with existing GIS efforts.

Issue: Provide Single State Agency Contact to Prepare Focus/Strategy for Environmental Cleanup of an Entire Area

Background

Due to the way the DNR assigns cases, a number of different individuals could be assigned to projects within a specified area.

The problem this creates is that it makes it difficult to understand area-wide problems and to conceptualize area-wide solutions. Under redevelopment, this situation also arises when cross program reviews are necessary to obtain permits or determine compliance with individual program codes. Since different staff and programs are involved, priority differences can create time delays.

Also, for the parties involved, trying to keep track of various DNR project managers can be confusing and make coordination of meetings difficult.

Proposal

A single point of contact should be assigned by the agency to manage the project. This individual could either act as the project manager, in the case of an area-wide project with a limited scope, or as a project coordinator in cases where the project is much larger in scope; straddle DNR geographic assignments; or coordinate review by other programs. This single point of contact would be responsible for maintaining the area-wide focus of the project and coordinating reviews to prevent unnecessary delays.

Comments

WMC's Comments: WMC supports this proposal and believes this goal can be met with existing resources.

Type of Change: Administrative
Resources: Additional resources would be necessary if this creates an additional workload for the Remediation and Redevelopment program.

Issue: Use of Natural Attenuation in Area-wide Groundwater Approaches and Consideration of Groundwater Use In Conducting Cleanups

Two proposals were put forward to address Uncertainty Regarding Establishment of Cleanup Objectives.

PROPOSAL #1 – Use of Natural Attenuation in Area-wide Groundwater Approaches

Background

The issue is whether the case closure requirements relating to natural attenuation should be modified to expand the availability of natural attenuation as a remedy in circumstances in which a large geographic area is underlain by groundwater contamination, when such modifications could result in significant clean-up cost savings, and would continue to protect public health, safety, welfare and the environment.

NR 726 sets forth the requirements for obtaining case closure. NR 726.05(2)(b) provides that the DNR (DNR) can grant case closure when an enforcement standard or preventative action limit is exceeded if the following criteria are met:

1. Adequate source control measures have been taken;
2. Natural attenuation will bring the groundwater into compliance with NR 140 within a reasonable period of time;
3. Groundwater contamination exceeding the preventative action limits will not migrate beyond the boundaries of the property for which groundwater use restrictions have been recorded;
4. If there is an enforcement standard exceedance on the property, a groundwater use restriction must be recorded at the register of deeds; and
5. There is no existing or anticipated threat to public health, safety, welfare or the environment.

The third criteria discussed above prohibits the use of natural attenuation to obtain case closure if groundwater contamination exceeding a preventative action limit will migrate to properties for which there is no groundwater use restriction. In an urban area with groundwater contamination where there are many different landowners, this requirement greatly restricts the ability to obtain case closure. When hundreds of landowners may be impacted, it is not practical to obtain a groundwater use restriction from each landowner. This is particularly true when the landowner providing the use restriction may not be liable for clean-up costs due to the recently enacted liability protections relating to off-site groundwater contamination. This groundwater use restriction is likely to be viewed as having a negative impact on the landowner's property value.

It should also be noted that the requirement for natural attenuation to bring the groundwater into compliance within a reasonable time may restrict the use of natural attenuation if it is interpreted too narrowly. The DNR needs to take a liberal view of what constitutes a "reasonable time" when considering the issuance of case closure based upon a natural attenuation remedy when the contaminated groundwater does not present a threat to health or the environment.

Proposal

Rather than require a groundwater use restriction, the DNR needs to allow the use of institutional controls to provide notice to the public. These institutional controls could include city ordinances prohibiting the drilling and use of water wells without prior approval. This approach would help eliminate the stigmatism associated with contaminated property and provides no additional threat to public health.

DNR contends there may not be adequate enforcement of ordinances relating to wells. It is unclear however, how enforcement would be improved by providing notice through a groundwater use restriction rather than through an ordinance. Well-drilling activities are usually conducted by professionals who should have knowledge of local ordinance requirements.

DNR must also interpret the "reasonable time" requirements in a manner that allows natural attenuation to be used in a large area. While the DNR has current authority to do this, it may be helpful to further define this term to provide better guidance. For example, if the rule were modified to read, "within a reasonable time, but not to exceed 100 years," those using the rule would have time frame within which to work.

Comments (Please see Proposal #2 for all comments)

Type of Change: Statutory
Resources: Not Addressed

PROPOSAL #2: Considering Groundwater Use in Conducting Cleanups

Background

The issue is whether the use, and potential use, of groundwater should be considered in determining what remedial activities are appropriate in an area with groundwater contamination when such consideration would result in significant clean-up cost savings and continue to protect public health, safety welfare, and the environment.

Chapter 160 of the Wisconsin Statutes, along with NR 140, protect groundwater as a potential drinking water source regardless of its natural quality or potential yield. The same groundwater standards are applied to contaminated sites underlain by either usable or unusable groundwater. Consequently, scarce resources are expended on the remediation of groundwater that pose little or no threat to public health or the environment. Some other states have recognized this issue and apply different standards based upon whether groundwater will be useable.

Proposal

A number of approaches can be taken to address this issue, including:

- providing different clean-up criteria for useable and non-usable groundwater;
- providing flexibility in determining the point of standards application so that it can correspond to an existing or a potential future drinking water well; and

- when natural attenuation is proposed as a remedy in an area in which groundwater will not be used, use a very liberal definition of what constitutes a "reasonable time" for natural attenuation to occur.

Type of Change: Statutory, Regulatory
Resources: Not Addressed

Comments On Both Proposals

Division of Public Health, Bureau of Environmental Health Staff Comments (Mark Werner, Ph.D., Lynda Knobeloch, Ph.D; please see October 22, 1998, memo in Appendix D):

We have reviewed the recommendation on natural attenuation submitted to the Brownfields Task Force subgroup on area-wide groundwater cleanup approaches (of which Dr. Werner is a member). This recommendation proposes several changes in the requirements that are set forth in NR 726. Specifically, its authors suggest that criteria 3 and 4 which require that the PAL not be exceeded off-site, and that groundwater use restrictions must be filed with the register of deeds for exceedances of the ES, limit use of Natural Attenuation as a remedial option. In addition, the authors argue that if the groundwater is not used as a drinking source, public health issues can be disregarded - presumably because there is no potential for exposure.

We disagree with this position and would like to offer the following perspectives. Over the past decade, our office has dealt with many cases in which contaminated groundwater has transported toxic chemicals several hundred feet from the original source toward residences, schools, hospitals, and businesses. When contaminant plumes reach these structures, toxic chemicals can seep into the buildings through cracks in the foundations or through sewer lines and pose a threat to the health of building occupants. Specific examples of this problem have been seen throughout the state. We are currently dealing with a large apartment complex in Milwaukee where tetra- and trichloroethylene were detected in air samples collected from the two units. The source of these volatile chemicals was an industrial landfill located on an adjacent property. In the past, our staff has inspected homes near old chrome plating shops that had yellow crystals of chromium salts on basement walls. We frequently find gasoline vapors and vinyl chloride in the basements of homes that are impacted by plumes of contaminated groundwater. All of these situations pose a high exposure risk to occupants and require immediate intervention measures such as relocation of the affected families or soil excavation accompanied by ventilation of the homes. In addition to threatening nearby residential concerns, contaminated groundwater sometimes discharges to surface streams, rivers, or wetlands. Contamination of these water bodies can pose a threat to amphibians, fish, birds, and other wildlife. To protect against these problems, we believe that contaminated groundwater should be cleaned up in a timely fashion, regardless of its use as a public or private drinking water supply.

We also disagree with the author's contention that a "reasonable period of time" should be defined as a period not to exceed 100 years. We agree that "reasonable period of time" is too subjective to provide regulators with meaningful guidance. However, we believe that natural attenuation should be considered as an option only in situations where contamination levels are low, the zone of contaminants is small, and there is no potential for exceedances of the PAL beyond the property boundary. In these cases it would seem likely that natural attenuation would occur in a short period of time - perhaps over a year or two.

Peter McAvoy, 16th St. Community Health Center, Brownfields Study Group Member, Comments: Mr. McAvoy notes that it is his experience in working with the DNR that a great deal of flexibility already exists with which the Department can deal with specific proposals to clean-up groundwater, including using natural attenuation. As a community member who is actively involved in efforts to re-develop the Menomonee River Valley in Milwaukee, he suggests that the state or other interested parties explore the possibility of funding a targeted pilot study to determine the effectiveness of utilizing phyto-remediation and natural attenuation as a remedy in an older, historically industrial developed area impacted or potentially impacted by area-wide groundwater contamination, such as the Valley. He is aware of an interest that Marquette University engineering faculty and scientists with various environmental engineering firms have in conducting such a pilot. Moreover, there is currently a growing partnership of a variety of interests that has joined together to redevelop the Valley. Any technical assistance with this effort by the state or other interested parties would only serve to strengthen that partnership and complement efforts by the City of Milwaukee now underway to consider area-wide strategies for addressing groundwater contamination in the Menomonee River Valley.

There are a number of advantages to conducting an actual, real world, site specific study of the practicality of using phyto-remediation and natural attenuation in a place such as the Menomonee River Valley: (1) scientific information collected from such a study could aid the development of remedies on nearby properties with similar hydrogeo/chemical and land use attributes; (2) methods of assessing other potential impacts, such as surface water as well as drinking water impacts, could be developed; and (3) the methods developed could be used to develop appropriate remedies in other areas of the state that are similarly impacted by area-wide groundwater contamination.

The suggestion that natural attenuation could be achieved by placing a groundwater use restriction by ordinance over a designated area fails to address the fact that neighboring property owners oftentimes lack the resources to determine whether their properties are indeed affected by groundwater contamination migrating from off-site. This could create potentially serious health impacts for those property owners and the people that live and work on those properties.

Lastly, Mr. McAvoy notes that the "reasonable period of time" language cited in the proposal is ambiguous because the determination is so site specific. "Reasonable" is a legal term of art that allows the DNR to take into account the myriad factors that may or may not make a period of time at any given site "reasonable." Certainly, the DNR cannot be unreasonable, but any blanket definition of what is reasonable, "not to exceed 100 years" for instance, would serve to prevent the DNR from using its expertise in carrying out its mission to protect human health, welfare, and the environment.

Caryl Terrell, Legislative Coordinator, John Muir Chapter-Sierra Club, Brownfields Study Group Member, Comments (please see Appendix D for copy of memorandum):

The WMC proposal is not new. It has been discussed and rejected by other administrative rules advisory committees, DNR staff, and the Natural Resources Board.

A. Here are some observations about why this proposal should again be rejected.

1. Deed restrictions are most specific to the parcel, accurate, available and likely to be a searched source of information for affected parties, whether they are neighboring property owners, prospective buyers, mortgage holders, etc. Without a deed restriction there is no

oversight of the use or the future use of the property nor any warning of the potential exposure to contaminants if the property is disturbed. Without a deed restriction, there is no documentation that the previous owner legally dealt with the parcel's contamination and properly handled and disposed of wastes at the site. This could initiate another round of involvement with the DNR and the court system over liability. Without documentation that the property can be redeveloped, the parcel is not only "stigmatized" (as some on the committee have claimed) but also unmarketable.

2. Substituting municipal institutional control has several immediate disadvantages.
a. It shifts responsibility for the accuracy and maintenance of the information from the most affected party (the property owner) to the collective government representing every municipal resident and every parcel of land.
b. It is unclear how the municipality will store the information but this information is likely to become less specific to the parcel, more generalized, less available and less likely to be consulted by potentially affected parties.

B. The proposal also implies that the residual groundwater contamination is no longer of public concern. Clearly, this is untrue, otherwise a closure letter would have been issued. Here are some observations about groundwater concerns, especially in urban areas.

1. The safety of drinking water supplies is a serious problem. A 1994 Times Mirror poll shows that seven in eight Americans are concerned about their drinking water. For good reason. Treated public drinking water is not always safe to drink. One-half of Americans – 116 million people – drink from water systems that violate EPA standards and rules. The Centers for Disease Control and Prevention estimate that 900 die each year and almost a million are sickened, causing great hardship and the loss of billions of dollars in lost life and productive work.

2. The Sierra Club believes that pollution prevention is the most cost effective way for communities to protect their drinking water supplies and other water resources.
a. Public drinking water supplies should not make people sick or contribute to their death. U.S. EPA does not have a complete set of drinking waster standards for the many pollutants found in drinking waster. Known sources of contamination are often unregulated. Communities have limited legal and technical tools and money to protect their drinking water supplies. We should be helping these communities in every way possible to make it safe to drink water from the tap in any Wisconsin community.

b. I have attached an article summarizing the 115-page report of the Urban Land Institute, Assessing the Experience of Local Groundwater Protection Programs, listing 68 distinct methods being used by localities to protect ground water. "The report concludes that a sound ground water protection program must include at least some police/regulatory powers, such as zoning ordinances, operating standards, etc. These types of powers should be complemented with 'softer' methods such as public education, water conservation, household hazardous waste collection and similar types of non-regulatory activities." (p. 5 "Study of Local Programs Uncovers Nearly 70 Different Ways to Protect Groundwater" in Ground Water Bulletin, Summer 1994, p. 4-5).

c. The ability of municipalities to effectively use these tools will vary with the training and knowledge of staff and the resources for enforcement. An example is the lack of enforcement of well abandonment ordinances.

3. In only a few areas of the state has our groundwater resource been intensively studied. Without site-specific information, it is unwise to make generalizations about the isolation of one aquifer from other aquifers.

a. For example, only after considerable research are hydrogeologists now able to state that the confining unit (separating the upper and lower aquifers) is largely absent in the Madison lakes area and eastern portion of Dane County (p. 24 and 26, Evaluation of Alternative Management Strategies, one of the technical reports of the Dane County Regional Hydrogeological Study August 1997 completed by the US. Geological Survey and the Wisconsin Geological and Natural History Survey). Using an opposite assumption, planners and water utility managers have until recently been less concerned about potential drinking water supply impacts of waste sites and brownfields in these areas of the county.

b. Does the WMC proposal include support for in-depth groundwater hydrogeologic studies to verify "isolation" of a particular aquifer? I don't find this in their proposal.

4. Most Wisconsin communities are growing and spreading over currently undeveloped land. One cannot assume that any aquifer in the state will not be needed for future human use.

5. Use of urban aquifers is subject to change. For instance, several communities (Milwaukee and surrounding cities, Green Bay and surrounding cities, Madison and surrounding cities) are studying combining surface and groundwater to deal with regional drinking water quality and quantity problems as well as new uses for exhausted aquifers, such as storage (see Fifth Annual Wisconsin Water Law conference proceedings, particularly paper by Lawrie Kabza). The issue would be further complicated where groundwater contamination is left untreated.

C. How does the WMC proposal contribute to a Brownfields Redevelopment Strategy?

I also confess to being baffled by such anti-economic redevelopment and anti-property value proposal. What we lose is a single property identified as a source of continuing groundwater contamination with a responsible party maintaining oversight and available, indeed, responsible to monitor trends and act immediately if the contamination increases or moves off-site. In its place, the municipality will have to identify the unclosed site as a potential continuing source of contamination and, without the ability to receive updated information over time, will conservatively delineate the site and surrounding area as a pollution source to its drinking water supplies.

This information will be published, under U.S. EPA's Drinking Water Right to Know rules. Presumably, diligent real estate agents and prospective developers will learn that a large area is contaminated and not being dealt with. This is directly counter to the Brownfields Redevelopment strategy.

Please reject the WMC proposal to substitute municipal well ordinances for deed restriction on property with groundwater contamination.

DNR Bureau of Drinking Water and Groundwater Staff Comments (please see Appendix D for more DNR comments and background information): Attachment B is outside of the scope of this subcommittee or committee and does not identify any problem that it is trying to fix. It does little to further discussion or provide solutions on how best to clean up groundwater on an area-wide basis. Eliminating groundwater use restrictions and being liberal in what constitutes a

"reasonable time" for cleanup does little to effectuate groundwater cleanups. The factors listed under s.NR 722.07(4)(a), Wis. Stats., already provide much latitude in determining cleanup time frames. The use, and potential use, of groundwater is already a factor considered when determining cleanup time frames (see s.NR 722.07(4)(a)4., Wis. Stats.) and is a factor used in determining the type and aggressiveness of remedies required. For example, if contaminated groundwater is non-potable, the cleanup time frame is typically long and less aggressive, long-term remedies, such as natural attenuation, are considered. Further, if multiple properties work together in developing a cleanup time frame on an area-wide basis (where appropriate), rather than on a site-specific basis, time, cost and effort will be reduced. Therefore the subcommittee should not forward attachment B on to the committee or the whole. If Attachment B is forwarded to the committee at a minimum the following disclaimers should be attached to it. 1) B is outside of the scope of the committee, 2) there were many subcommittee members who did not support its concepts, 3) it does not identify any problem that it is supposed to fix, and 4) it will provide confusion to this effort rather than clarity.

DNR Bureau of Remediation and Redevelopment Staff Comments:

Regarding natural attenuation area-wide groundwater approaches:

1. The Department recently addressed the issue of whether existing municipal ordinances, with requirements for well permitting and abandonment, provide the same level of protection to human health, and the environment and provide adequate public notice for property owners, the public, prospective purchasers, and lenders. In response to a Natural Resources Board (NRB) request to evaluate the feasibility of the proposal, Secretary Meyer conveyed a memorandum to the NRB (dated 7/17/97) that indicated that these municipal ordinances are not adequately administered or enforced.

2. Notice to property owners, residents and workers cannot be adequately conveyed in the detail necessary to allow them to make informed decisions about the level of risk they face. Direct contact threats have in the past been posed to citizens via groundwater seepage into basements.

3. The comparison of a property-specific deed restriction on groundwater use to a municipal ordinance restricting groundwater use is akin to comparing apples to oranges. Deed restrictions are legally enforceable by the Department and on record until groundwater is brought into compliance with Ch. NR 140 groundwater standards. Municipal ordinances cannot be similarly be relied upon to prevent the use of contaminated groundwater because they are subject to change at any time by the municipality.

4. It may be technically impractical to assess the effectiveness of a proposed natural attenuation remedy over a wide area. Diverse media, as well as diverse mass and concentrations of contaminants over a large area, render the modeling necessary to predict the success of natural attenuation impractical. It would also be difficult to assess the threat posed to diverse and numerous receptors over a large area.

Regarding the consideration of groundwater use in conducting cleanups:

1. Groundwater use is already considered when determining a "reasonable period of time" for groundwater quality to be restored to Ch. NR 140 standards. Where no potential receptors exist, the "reasonable period of time" allowed for natural attenuation to work is longer than is the case when potential receptors are present.

2. Complicated groundwater interconnections, both man-made and natural, render any assumption that groundwater in "unusable" aquifers (e.g. tight clay surface aquifers) will not migrate to usable aquifers speculative at best. The in-depth hydrogeologic studies necessary to confirm that an aquifer is "isolated" would be costly and, in the end, a less reliable means of ensuring groundwater quality than requiring up front that groundwater meet state standards.

3. Even in aquifers where groundwater is not used for consumption, groundwater contaminants can and have seeped into basements and posed direct contact threats to residents and workers. Ecological and human health impacts associated with the discharge of contaminated groundwater are also a concern.

The Brownfields Study Group was directed to "[s]tudy optional methods to clean up groundwater on a comprehensive, rather than property-by-property basis." This proposal does not address "clean up." Rather, it is a proposal to change the state's groundwater law. Because the groundwater law is a topic of interest to a wide range of public and private interests- one that the Legislature most certainly would have explicitly identified as an issue- many staff feel that this proposal is outside of the charge of the Study Group.

WMC's Comments:

1. Natural Attenuation, Area-Wide Groundwater Approaches.
   WMC supports changes to the case closure requirements relating to natural attenuation. More specifically, the groundwater use restriction requirements need to be modified. In many instances, these requirements needlessly taint property.

2. Considering Groundwater Use in Conducting Cleanups
   WMC supports considering groundwater use in conducting cleanups. As recently pointed out in the Legislative Audit Bureau's Report on the Petroleum Environmental Cleanup Fund, "the discovery of any subsurface water-ranging from saturated soils to aquifers capable of serving as a drinking water resource - triggers application of the Groundwater Law." As other states have concluded, its does not make sense to ignore these distinctions in conducting cleanups.

The City of Milwaukee's comments for this issue are found in Appendix A.

Issue: Clarify Uncertainty Regarding Establishment of Cleanup Objectives

Background

Establishment of required cleanup objectives is a significant factor affecting the cost to clean up environmental contamination at brownfields sites. Cleanup standards for soil and groundwater are established in accordance with Chapters NR 720 and NR 140, respectively, of the Wisconsin Administrative Code.

Application of these codes is described in several published, draft and pending guidance documents prepared by DNR, and is considered by many to be an evolving process of clarifying application to specific sites and situations.

There continues to be uncertainty among the affected parties and their environmental consultants and legal counsels, and potentially among DNR regional staff, regarding application of the code and guidance documents. This uncertainty with respect to potential final costs, affects the redevelopment of brownfields sites.

Two factors that affect the uncertainty regarding application of cleanup objectives are implementation of the "groundwater closure flexibility" code changes and current activities related to the soil cleanup standards in NR 720.

The DNR acknowledges that staffing levels and demands for responding to other departmental issues has potentially affected the implementation of "groundwater closure flexibility" and use of institutional controls. Another commonly expressed concern is whether risk-based correction action (RBCA) principles are applied in Wisconsin to assure cost-effective cleanups while still protecting human health and the environment.

The DNR issued a fact sheet in October 1996 describing the similarities and application of the RBCA process to Wisconsin's corrective action rules (i.e., NR 720 and 140).

Proposal

The DNR should enhance outreach efforts to clarify the existing statutes, codes, guidance and practical application regarding cleanup requirements and standards. At a minimum this effort should be coordinated with existing internal and external advisory groups and other ongoing Department initiatives.

Additional initiatives may be necessary to adequately reach the affected parties, including those interested in redevelopment of brownfields sites. The process should include examples of actual case histories from past and future sites, including clarification of how the RBCA process/philosophy is considered or applied under current statute, code, guidance and application in Wisconsin.

In addition, it is recommended that a database of site closure decisions be created and maintained, which would include a brief background of the site setting and contamination conditions as well as the specifically established clean-up objectives for the site.

Comments

DNR Comments: DNR believes that the availability of such information would greatly benefit the cleanup and redevelopment of brownfields. However, the DNR currently does not have the staff or contracting resources available to meet this need.

Type of Change: Initially Administrative. Potentially Regulatory.
Resources: Staff time for Remediation and Redevelopment program to coordinate the working group and for other state agency representatives on working group.

Chapter 5 – Brownfields PUBLIC OUTREACH AND EDUCATION INITIATIVES

Reaching out to the public on brownfields – including local governments, private businesses and the general population – presents unique challenges to those parties involved in cleaning up and redeveloping abandoned or idle properties. These challenges include access to important infrastructure, real estate or other redevelopment information; awareness of state and regional brownfields programs among local governments; consistent coordination among state agencies for electronic and non-electronic brownfields information; and overall awareness of brownfields redevelopment among the populace.

The Study Group reviewed and discussed a number of public outreach and education challenges, and presents their findings in the following pages. Discussion points included providing user-friendly information on a brownfields web site, developing helpful Geographical Information System (GIS) data to help public and private parties, raising awareness of brownfields with the general public, developing tools to help existing or new non-profit/quasi-governmental entities redevelop brownfields, and studying the costs and benefits of brownfields redevelopment vs. developing dwindling and critical greenfields.

Incentives proposed in this Chapter:

- ➢ **Expand the Use of GIS for Brownfields**
- ➢ **Promote Public Outreach and Education in Brownfields Redevelopment**
- ➢ **Promote Non-profits/Quasi-governmental Entities in Brownfields Redevelopment**
- ➢ **Expand the Development of Brownfields Case Studies**
- ➢ **Enhance Communication Between Government Entities Concerning Tax Delinquent Properties**

Issue: Expand the Use of Geographical Information Systems (GIS) for Brownfields Redevelopment

Background

One of the greatest costs of expediting brownfields redevelopment is the cost of gathering existing information on a site or multiple sites. While there are on-going efforts to coordinate, consolidate and integrate land information databases and Geographic Information System (GIS) resources among state and private users (such as the Department of Commerce's Brownfields Internet GIS), these efforts should have, as a priority, information that is useful to promote property transactions and redevelopment.

Proposal

- The existing Wisconsin Land Council - State Agency Resource Consortium, or a comparable entity, in cooperation with the Wisconsin Land Council - Technical Working Group, should be given the responsibility of establishing information technology standards and protocols for implementing a coordinated GIS effort among all the state agencies, including those focused on GIS brownfields. This information should be made available to the public in a user friendly, compatible format, incorporating brownfields information. Priorities on which site characteristics and infrastructure to include should be established with brownfields redevelopment as an objective.

- The state should begin a process of converting from reporting via paper documents to mandatory electronic submissions in a standardized electronic format. First priority should be given to environmental and infrastructure data and to integrating existing electronic databases. In lieu of an electronic submission, a fee should be assessed to convert paper submissions into an electronic format.

- Create a pilot study to test if the GIS recommendations and processes work. This study could be conducted in, encompassing or adjacent to a federally-designated enterprise zone or state designated development zone.

- Pending completion and evaluation of the pilot study, funding should be provided to create an interagency office of GIS, housed within the Land Council, with additional funding to provide full-time GIS staff, accountable to the interagency office, at each state agency. At a minimum, interagency GIS staff should be provided at the departments of Commerce (DOC), Natural Resources (DNR), Revenue (DOR) and Transportation (DOT).

- Existing electronic data sources should be integrated and made available as soon as possible, with additional resources added, as they become available.

- Information should be available electronically on an anonymous basis to preserve the confidentiality of real estate transactions.

Comments

Department of Commerce: The Department is fully supportive of the efforts outlined in this report which would assure that information exchange is coordinated, open to everyone and user-friendly.

Currently, the Department of Commerce is creating the GIS Brownfields Web Site in order to help return abandoned, unproductive brownfields into viable uses once again. The Department has received funding and has been directed by the Legislature and governor in the 1997 Wisconsin Act 27 to lead the efforts to organize, compile and create the GIS program for brownfields. The Department is currently constructing the program and working with local officials, citizens and other state agencies, such as the DNR and DOT. At this point in the program's development, the Department would agree with the comments made by DATCP that the creation of new positions at each agency would not be necessary to move the program forward. The only staffing recommendation would be to create and receive funding for a permanent Brownfields GIS position that is responsible for the creation and coordination of this program. It is important for this position to be permanent in order to retain qualified individuals who can compile and work with existing data sources, work with other state agencies, create the program, be able to easily provide maintenance, and to be an agency member of the state's efforts to coordinate all GIS applications on the DOA's land use council.

It is unclear whether the Public Outreach Subgroup's recommendations are to assure that information is readily available and that programs are used with consistent software or if a new Brownfields GIS is being proposed. If the proposal is the creation of a new Brownfields GIS, the Department would not support this because a Brownfields GIS is currently being constructed.

Type of Change: Regulatory, Policy
Resources: Once the pilot study is completed and evaluated, one new or redirected full time staff position plus necessary support equipment should be made available for each of the following agencies: DNR, DOT, DATCP, DOR, DHFS and the Department of Commerce.

Issue: Promote Public Outreach and Education in Brownfields Redevelopment

Background

The Study Group recognizes that there are on-going efforts to coordinate public information on brownfields between the state agencies. However, a need still exists to expand these efforts to more adequately educate the public on brownfields issues. There are key groups that need additional brownfields information and specialized assistance, particularly local governments.

Proposal

Electronic Access

- Create a single interagency brownfields web site, linking brownfields resources at each agency and regional/local links. The state should establish a single location identity (e.g., www.brownfields.state.wi.us), with weekly updates, to coordinate access to information among several agencies, including the on-going interagency efforts to coordinate GIS resources.

Conventional Means of Access

- The Study Group supports the concept of a one-stop shop for brownfields information, and recommends an interagency communication plan between all agencies to assure that each agency is providing brownfields-related information to a central clearinghouse.

- The existing Memorandum of Understanding (MOU) between DOA, DNR and DOC provides for the dissemination of information through several media, including printed materials, a telephone hot line, fax, email and referrals to the brownfields web site.

- That outreach materials should include, but not be limited to, information on the environmental, social, economic, and health impacts of brownfields redevelopment. Information on these impacts may be developed in separate topical fact sheets and brownfields case studies.

- The Study Group applauds the brownfields seminars offered across the state and encourages the development of a standing outreach committee that would provide a communication package for brownfields redevelopment and community outreach. This interagency committee is encouraged to make their services available to any local government applying for state supported funding.

- Local governments require a focused or targeted communications plan, with an emphasis on providing training and assistance on site-specific issues of relevance to municipalities. Enhancing relations with local government associations and providing at least annual training – such as a one-day workshop for local governments only – would be of great benefit to Wisconsin communities.

Comments

Type of Change: Regulatory, Policy, Administrative
Resources: Existing staff resources would need to be redirected; one staff position is anticipated to coordinate and maintain information resources.

Issue: Promote Non-profits/Quasi-governmental Entities in Brownfields Redevelopment

Background

The Study Group recognizes that there are ongoing efforts by state government, local government, quasi-governmental, educational and other entities to help build local capacity for brownfields redevelopment. However, the Study Group also recognizes that there are still gaps in building local capacity for brownfields redevelopment throughout the state in a wide variety of avenues, including but not limited to technical, financial, legal and educational resources.

Proposal

- The Study Group proposes providing support for an existing or, if necessary, a new non-profit or academic entity to bridge the gap between existing resources and the need for additional capacity building. This organization should be independent of local, state or federal government, and governed by a steering committee with representation from the multiple private sector disciplines involved in redevelopment, including environmental justice, finance, health, legal, real estate, and technical/environmental.

- The non-profit entity should ultimately be self-supporting through fee-for-service arrangements and private sector donations. Seed money should be provided, however, for six months of needs assessment and 18 additional months of operations.

- Following an initial period of assessment, the non-profit entity would work with local governments, existing regional and local non-profit organizations and quasi-governmental entities, such as redevelopment and housing corporations, to provide brownfields-specific professional services; build existing capacity for brownfields redevelopment; if appropriate, engage in direct acquisition and redevelopment of brownfields; and advocate on behalf of the public interest in brownfields redevelopment.

- Recognizing the important role of non-profits in redeveloping lands for public use, the Study Group proposes that the state Legislature expand the liability exemption in 292.11 (9) (e) 1s., Wis. Stats., to include non-profits and programs/projects that have a non-economic focus – for example, land re-use to create parks and forests.

Comments

Type of Change: Statutory, Regulatory, Policy
Resources: If the creation of a non-profit/quasi-gov't. entity is deemed appropriate, an initial funding period of four years to establish the organization would come from a state revenue source. The second two years of funding would require a matching source of revenue. For example, when creating the umbrella land trust group Gathering Waters, the state Legislature approved a $75,000 appropriation using the motor-boat fuel tax from the Water Resources fund, with a $25,000 match required by the land trust.

Issue: Expand the Development of Brownfields Case Studies

Background

The Study Group recognizes that accurate information regarding the costs and benefits of brownfields redevelopment does not currently exist, including a comparison of the tangible and intangible costs of brownfields redevelopment and so-called "greenfields" development projects.

Proposal

- A systematic study should be undertaken to quantify the expected costs and returns of redeveloping an environmentally problematic property as well as a greenfields development. The study could be conducted in, encompassing or adjacent to a federally-designated enterprise zone or state-designated development zone. The study should also include, among other factors:

  - the difference between market driven redevelopment projects and publicly supported projects;
  - the cost of comparable greenfields development projects;
  - comparative cost of infrastructure for different forms/locations of development;
  - intangible costs – such as societal cost of additional miles driven, added pollution, etc. – and existing mechanisms to quantify these costs;
  - comparative costs of police/fire and municipal services;
  - estimating the diminution in value of contaminated properties;
  - the extent and use of available cost recovery methods; and
  - the benefits of various forms of development – commercial/industrial/ residential.

- The research should be conducted through an academic facility with existing capacity to conduct a study in urban land economics and the private sector real estate market.

- The parties receiving state brownfields funding should be required to make information available, on a confidential basis if appropriate, to support the study.

Comments

Type of Change: Policy
Resources: None

Issue: Enhance Communication between Government Entities Concerning Tax Delinquent Properties

Background

Currently multiple parties are involved in the establishment of assessments of commercial and manufacturing properties. Local assessors establish assessments for residential and commercial properties with the Department of Revenue setting the value for manufacturing properties.

Generally, there is a lack of communication between property owners, the assessor, the county and the state over the environmental condition of a property. This results in a situation where a property may be over valued and a significant amount of back taxes owed. It has been estimated that as many as 1,500 brownfields properties are behind in the payment of property taxes.

Counties and the City of Milwaukee are responsible for "buying" the tax roll for delinquent taxes at the end of each year. They must pay the amount of taxes due to other governmental taxing entities at that time.

In order for a private developer or a local unit of government to take title to the property, they must typically pay the back taxes and interest. This creates an additional financial burden associated with the redevelopment of the property. One brownfields property in the City of Milwaukee has a delinquent property tax bill of $500,000.

Proposal

- Improve communication between the appropriate state environmental agencies (DNR, DATCP and COMM), local assessors and building inspectors, county treasurers and DOR as to the environmental condition of a property. Information on potential costs of investigating and cleaning up a property needs to be shared with the parties involved in establishing the assessed value of tax delinquent properties in a timely manner.
- Modify the DOR assessment policies to allow for the revaluation of the value of manufacturing property prior to the completion of a phase 3 environmental assessment.
- Provide training to assessors at all levels on valuation policies for brownfields properties.

Comments

DOR comments: The biggest problem for DOR and local assessors is notification about brownfields sites from DNR or Commerce. Many property owners have expressed reluctance to self-identify the property as contaminated. The DNR has provided technical assistance to local assessors in recent instances (e.g., Town of Fulton, Town of Beloit) where contamination has reduced the value of the property.

Currently, DOR can make assessment adjustments without a Phase 3 environmental study if there is a cost estimate from the taxpayer and verification of the problem from DNR. The adjustment can be modified when the actual numbers from the Phase 3 study are available.

Training on brownfields assessment has been provided at the annual Assessor's Institute sponsored by the League of Municipalities, International Association of Assessing Officers courses and DOR Manufacturing Bureau staff seminars.

Type of Change: Administrative and Policy
Resources: None

Chapter 6 – Issues For Further Study

The Brownfields Study Group discussed a number of additional topics, but did not make recommendations to address the issues. Some of these issues were beyond the scope of the Study Group and others, while the group felt they were important, would require too much time to analyze thoroughly.

The Study Group recommends that the State of Wisconsin conduct further study of the following topics.

- **Discourage Development of Greenfields.** The Study Group discussed developing real estate disincentives to discourage the development of farmland and open space. One idea discussed was a new fee that would be assessed on the development of greenfields. Related to this issue, the study group also discussed creating a development rights trading system.

- **Liability for Contamination in Public Rights-of-Way.** The Study Group also discussed contamination within public right-of-ways. Some participants felt that statutory changes were needed to clarify ownership of and environmental responsibility for the subsurface of public rights-of-way. The Study Group recognized that this is a complex issue with differing legal opinions.

- **Determining Value of Property Acquired Through Condemnation.** Another issue raised by the Study Group was the condemnation of contaminated property. To ensure that governments who condemn contaminated property pay only the fair market value, one member of the study group suggested that state law be changed to explicitly incorporate environmental investigation and remediation costs into the determination of property values. Given that cleanup costs are often uncertain, one option discussed was the inclusion of a "holdback" provision, where all, or a portion of, a condemnation award would be held in escrow until the cleanup at the condemned property is completed.

- **Private Cause of Action.** The Study Group discussed the option of creating a private cause of action in Wisconsin where a private party could recover its environmental cleanup costs on its property from the person who caused the contamination. Currently, only the State of Wisconsin is the only party that has the authority to require responsible parties to pay for cleanup of contaminated property. In the case of *Grube v. Daun* (210 Wisc. 2d 681(1997)) the Wisconsin Supreme Court clearly ruled that the Spill Law (s.292.11, Stats.) does not create a private right of action. A private cause of action could give private property owners additional financial resources to cleanup brownfields in Wisconsin.

- **Liability of Scrap Recyclers.** A member of the Study Group voiced concern about the environmental liability faced by scrap recyclers in Wisconsin. Given time constraints, the Brownfields Study Group decided not to make recommendations to address this issue. Interested parties agreed to discuss this issue outside of the Brownfields Study Group.

The Study Group also recommends that an Attorney General's opinion be sought on the constitutionality of the following:

- **Valuation of Tax Delinquent Lands.** The Study Group discussed instituting a tax provision that recaptures the property taxes lost when the assessed value of the property is reduced due to environmental contamination. The revenue recaptured by the tax could be used to assist the state in cleaning up contaminated sites. In addition, this would provide a financial motivation for property owners to clean up their properties because owners of contaminated property would no longer realize the benefit of a reduced property tax bill. This "contamination tax" was recently upheld by the Minnesota Supreme Court. The court found that this "unique form of taxation" did not violate the uniformity clause, the equal protection clause, or the "takings" clauses of the Minnesota and/or U.S. Constitutions.

APPENDICES

Appendix A – General Comments to Brownfields Study Group Report

City of Milwaukee Comments

Chapter 1 – Brownfields Incentives for Local Governments

Issue: Clarify Blight Elimination and Slum Clearance Authority

Case Summary

Redevelopment Authority of City of Milwaukee was organized for the purpose "of carrying out blight elimination, slum clearance, and urban renewal programs and projects(.)" s.66.4313(a)(1), Wis. Stats. On April 30, 1998 RACM adopted a resolution approving blight designation and spot acquisition of five privately-owned properties near North 49th Street and West Lisbon Avenue. On May 27, 1998 the Common Council adopted a resolution approving the blight designation. RACM sought access to the property to conduct a Phase II environmental study but was rebuffed by the owners. Negotiations failed and on June 17, 1998 RACM filed a state court declaratory judgment action seeking injunctive relief allowing RACM to inspect the properties.

RACM's suit was based on s.66.431(5)(a)3, s.66.122 and s.66.123, Wis. Stats. Section 66.431(5)(a)3 gives RACM all powers necessary or incidental to carry out and effectuate the purpose of s.66.431 including "within the boundaries of the city to enter into any building or property in a project area in order to make inspections, surveys, appraisals, soundings or test borings, and to obtain an order for the purpose from a court of competent jurisdiction in the event entry is denied or resisted(.)" Sections 66.122 and 66.123 are procedures by which building inspectors and similar officials may obtain a "special inspection warrant" for a specific property upon application to the Court.

On June 26, 1998 the trial Court granted RACM's motion for immediate injunctive relief, granting RACM access to the properties for environmental testing; however, the Court stayed the Order pending a July 22, 1998 hearing on the owners' contention that S66.431(5)(a)3 violated the warrantless search prohibitions of the Fourth and Fourteenth Amendments to the United States Constitution their Wisconsin counterparts.

The Fourth Amendment says:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Because the constitutionality of a statute was challenged, the Attorney General for the State of Wisconsin was invited to participate in the case. The Attorney General took the position that the unconstitutionality argument was without merit.

On July 22, 1998, the Court ruled in favor of RACM and lifted the stay on its previous Order. The Phase II study took place; but, on August 17, 1998 the property owners filed Notice of Appeal indicating their intent to challenge the trial Court's decision. The appeal is pending.

Chapter 2 – Financial Incentives for Brownfields

Issue – Create New State-wide Brownfields Tax Credit for Remediation Costs

The City of Milwaukee strongly believes that the tax credit should not be expanded, but rather should remain a part of the current Development Zone programs where it is targeted to the areas of greatest economic distress in the state.

Issue – Modify Environmental Remediation Tax Incremental Financing (ER TIF) District – s.66.462 Wis. Stats.

The City of Milwaukee suggests one additional modification to the ER TIF statute. This funding mechanism should be available notwithstanding the political subdivisions' role, if any, in causing the contamination. We feel it is inappropriate for a condition of this application of local funding be that "the political subdivision cannot have caused the contamination." The Brownfields Program has already changed its focus from "innocent purchaser" to "voluntary party." Further, Chapter 3 of this study report recommends amendment of the voluntary party definition by deleting the condition of not "recklessly or intentionally" causing a discharge. Given this approach, we think the same consideration should be provided to municipalities whether or not they caused the contamination. It can only result in a cleaner environment and more redevelopment opportunities benefiting all local taxing jurisdictions.

Chapter 3 – Liability Incentives for Brownfields

No comments

Chapter 4 – Area-Wide Groundwater Issues for Brownfields

Issue - Create Financial and Environmental Incentives for Cleaning up and Redeveloping Area-Wide Brownfields Contamination.

We are intrigued by the potential embodied in the SUDZ Program proposal but believe it will require some fine tuning to be complete. An important issue was raised at the full Study Group meeting; that is the need for early assessment of the problems and design of remedial actions. This knowledge base is essential to the formation of an appropriate funding mechanism, particularly if a tax increment district or a business improvement district is proposed.

We believe that this program should be targeted to the areas of greatest need. It is suggested that a pilot project be initiated, perhaps in the city's Menomonee Valley to further refine the process, study costs, etc. We support the adoption of a targeted SUDZ Program.

Issue – Use of Natural Attenuation in Area-Wide Ground Water Approaches and Consideration of Groundwater Use in Conduction Cleanups.

The ability to utilize an area-wide groundwater approach is similar to the historical surface water basin management program. This area-wide groundwater management approach will provide a more comprehensive and cost effective analysis of regional groundwater. We also fully support the use and application of the natural attenuation rules to this type of an approach. Clearly, the use of natural attenuation for area-wide groundwater approaches has the greatest potential to provide substantial cost savings. Area-wide approaches involving economies of scale will also offer cost benefits, but not at the same magnitude.

We believe that the wide-spread use of institutional controls, particularly deed notices and deed restrictions, will have a long term detrimental effect on property values and in the long run work against brownfields redevelopment. In the City, where we have a municipal water system not dependent on groundwater, municipal regulations which effectively prohibit groundwater wells, and a geology largely made up of clay soils overlaying glacial tills and bedrock, we believe there should be reasonable alternatives to deed restrictions. These could include, for example, zoning controls, permit programs and public outreach/education programs.

We do not support the concept of considering groundwater use alone in designing and conducting clean ups. However, we would suggest investigation of the concept of excluding clay acquitards as sources of groundwater similar to the concepts recently adopted and implemented in the State of Michigan. We recognize that this concept will require considerable investigative development of the factual setting and hydrogeologic setting of the clay acquitard. However, even with these increased investigative costs, considerable remedial cost savings could be obtained and the goal of brownfields redevelopment advanced.

We would also like to add that the area-wide concepts could be applied to soil contamination under certain circumstances.

Bruce Keyes, Foley and Lardner, Brownfields Study Group Member, Comments: As a general matter potentially affecting several proposals, Mark Thimke and I are concerned about the limited ability to bind the state to contractual agreement, including negotiated schedules. I believe this issue warrants further consideration. Under the sovereign immunity rule, the state cannot be sued unless it consents through an action of the Legislature. See Wisconsin Constitution, Article IV, Section 27. The consent must be clearly and expressly stated. Erickson Oil Products, Inc. v. State of Wisconsin, 184 Wis.2d 36, 43, 516 N.W.2d 755, 756. Sovereign immunity is procedural in nature and, if properly raised, deprives the court of personal jurisdiction over the state as well as its agencies. Id., citing Lister v. Board of Regents, 72 Wis.2d 282, 291, 240 N.W.2d 610, 617 (1976).

Consequently, while the Legislature has authorized the DNR to enter into agreements with parties, there appears to be no remedy or a remedy limited to a statutory amount of $50,000 for a breach, by the DNR, of such an agreement since only the Legislature can authorize a suit against the state.

Insurance may offer a costly and inartful way to address this problem, but a direct remedy through the Legislature would give parties greater reliance on agreements with the state. See Anderson v. City of Milwaukee, 208 Wis.2d 18, 559 N.W.2d 563 at 568 (1997) (the state can waive a damage limitation by purchasing insurance coverage if the policy contains an express statement that can be construed to waive the state's liability limit; under § 632.24, an action for negligence covered by an insurance policy can be brought not only against the insured, but also against the insurer); see also Sanhope v. Brown County, 90 Wis.2d 823, 280 N.W.2d 711.

December 10, 1998

Andrew Savagian
WI Department of Natural Resources
PC Box 7921
Madison, WI 53707-7921

Dear Andrew:

Wisconsin Manufacturers and Commerce appreciates the opportunity to provide comments on the proposed Brownfields Study Report. WMC is a statewide business association that represents approximately 4600 members who employ about 500,000 people in the state of Wisconsin. Our members have a keen interest in environmental cleanup and redevelopment issues. Consequently, we have been very active in legislative and regulatory matters that impact these issues.

Before getting into the specifics of our comments, we would like to address a few preliminary matters. First, we would like to commend the Department staff and Study Committee members for the significant amount of time and effort expended on this Report. We believe those involved in this effort, particularly Department staff, did an excellent job in completing such an expansive project in an extremely short period of time.

Second, the Department should be aware that these comments are preliminary in nature. We are still receiving feedback from our members on these matters. Thus, some of the positions suggested in these comments may be modified as certain proposals work their way into the legislature.

Finally, while we are obviously very supportive of brownfields redevelopment, we are also concerned about state and local government spending issues. As such, we have a general concern regarding the large increase of expenditures that would be required if this Report was fully implemented. We recognize that these proposed brownfields expenditures must be balanced with other state priorities, and we believe any additional brownfields expenditures should be made through existing resources.

Our more specific comments are set forth below. As requested, we have made these comments as brief as possible. We are, however, willing to provide more information on these positions if needed.

I. Chapter 1 Brownfields Incentives for Local Governments

A. Clarify Access and Inspection Authority for Local Units of Governments.

WMC opposes expansion of local governments' authority to access and inspect property. It is unclear why this additional authority is needed.

B. Modify Expenditure Restraint Program
WMC opposes exceptions to the Expenditure Restraint Program. As exceptions are granted to this program, the program soon becomes meaningless.

C. Strengthen Ability of Municipality to Recover Environmental Costs. WMC opposes the proposed municipal cost recovery provision that is proposed. We do not support creating a cause of action that is only available to municipalities, and we also have issues with the specific language proposed.

D. Clarify Blight Elimination and Slum Clearance Authority.
WMC opposes the expanded inspection authority contained in this proposal.

E. Modify Negotiation and Cost Recovery Process.
WMC agrees that the negotiation process contained in §292.35 of the Wisconsin Statutes needs to be modified. However, we believe that the changes proposed need to be further discussed to ensure any negotiation process is acceptable to potentially responsible parties, as well as to local units of government.

II. Chapter II – Financial Incentives for Brownfields

A. Permanent Funding Source for the Brown fields Grant Program WMC supports continued funding of the Brownfields Grants Program, but does not support continuance of the vehicle environmental fee.

B. In crease Funding for the Brown fields Grant Program.
While WMC does not oppose providing additional resources for brownfields from existing revenues, it is unclear what the source of the funding for this proposal would be.

C. Provide Flexibility with Development Zone Tax Credits for Remediation
WMC generally supports this proposal.

D. Create New Statewide Brown fields Tax Credit for Remediation WMC supports expanding the current brownfield tax credits and funding those credits through existing state resources. Furthermore, appropriate restrictions on the availability of such credits should be further examined.

E. Market Development of Transportation Brown fields Fund.
WMC supports the promotion of these programs.

F. Provide Funding for Neighborhood Revitalization Brown fields Projects.
WMC questions the need for creating another grant program rather than looking at modifications to existing programs. We also question where the funding for this program would come from.

III. Chapter 3 – Liability Incentives

A. Definition of Voluntary Party
WMC supports the expansion of the definition of "voluntary party". The current "reckless and intentional" exclusion discourages participation in the voluntary party process and needlessly increases staff's workload.

B. Identify Potential Sources of Funding to Cover any Future Cleanup Costs Associated with Expanding the Eligibility of the Voluntary Party Process.
WMC supports the study proposed in this section. Additional information is needed to determine if funding is even an issue that needs to be addressed.

C. Clarify and Streamline Solid Waste Requfrements to Facilitate Redevelopment
WMC supports this proposal. In general, the Department should consolidate remediation activities in one Bureau – the Bureau of Remediation and Redevelopment

D. Create Interim Liability Protection During the Voluntary Party Liability Exemption Process
WMC supports their proposal but does not agree that DNR needs five additional staff to implement this proposal.

F. *Ensure Availability of a Full Certificate of Completion for Protection Impacted with Off-Site Groundwater Contamination*
WMC supports this proposal.

IV. Chapter IV – Area-Wide Groundwater Issues

A. Lack of Information for Area-Wide Environmental Characterization WMC supports the proposals to obtain better groundwater related information, but does not believe that resources should be directed from cleanup efforts to fund these activities.

B. Lack of Single State Agency Contact to Provide Focus/Strategy for Environmental Cleanup of an Entire Area.

WMC supports this proposal and believes this goal can be met with existing resources

C. Natural Attenuation, Area- Wide Groundwater Approaches! Consideration of Groundwater Use in Conducting Cleanups.

1. Natural Attenuation, Area-Wide Groundwater Approaches. WMC supports changes to the case closure requirements relating to natural attenuation. More specifically, the groundwater use restriction requirements need to be modified. In many instances, these requirements needlessly taint property.

2. Considering Groundwater Use in Conducting Cleanups WMC supports considering groundwater use in conducting cleanups. As recently pointed out in the Legislative Audit Bureau's Report on the Petroleum Environmental Cleanup Fund, "the discovery of any subsurface water-ranging from saturated soils to aquifers capable of serving as a drinking water resource triggers application of the Groundwater Law." As other states have concluded, its does not make sense to ignore these distinctions in conducting cleanups.

V. Chapter V Public Outreach and Education

WMC supports the public outreach and education proposals in concept, but has concerns regarding how these efforts would be funded.

Thank you for the opportunity to comment. If you have any questions, please contact me at your convenience.

Sincerely,

Patrick K. Stevens
Environmental Policy Director
Wisconsin Manufacturers & Commerce

Wisconsin Electric
A WISCONSIN ENERGY COMPANY

December 14, 1998

Mr. Andrew Savagian
Wisconsin Department of Natural Resources
P.O. Box 7921
Madison, WI 53707-792 1

SUBJECT: Brownfields Study Group Report Dear Mr. Savagian:

On behalf of Wisconsin Electric, I would like to thank the Department of Natural Resources for the opportunity to participate in the Browufields Study Group and providing input into the final report. We appreciate the efforts Department staff devoted to this effort in soliciting the views of multiple stakeholders and melding this information into a final report that addresses the issues brought forward.

Our specific comments are limited at this time, and focus on three general areas.

- Financial Incentives – Several proposals are made in the report that recommend expansion of funding and financial incentives to voluntary parties and others to redevelop brownfields. We support the general concept of promoting redevelopment and continuation of the existing funding programs. However, several of the proposals for additional brownfield funding do not indicate the source of funds or long-term level of support necessary to continue such programs if they are expanded. As these proposals are moved forward, we suggest that longer term funding sources be identified from the enhanced value and revenue streams stemming from the newly redeveloped brownfields.

- Liability – Expansion of the definition of "voluntary party" and elimination of the "reckless and intentional" language within the statute is supported. These changes should reduce the hesitancy of some owners to take voluntary investigative and cleanup action.

- Information Systems – We support the recommended use of geographical information systems (GIS) for cataloging and disseminating information on soils, groundwater and other environmental information to support brownfields redevelopment. However, we strongly encourage the state agencies to adopt a uniform information technology standard for any future GIS activities in an attempt to minimize costs, reduce potential redundancies, and make the information more easily accessible and usable by all interested parties.

Again, thank you for the opportunity to participate in the Study Group and have input to the final report. Please do not hesitate to contact me if you have questions.

Brian P. Borofka
Environmental Strategy Team

Appendix B – Chapter 1 Comments/Information

Statutory Language For Blighted Areas

66.42 Blighted area law

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(3) Definitions. The following terms whenever used or referred to in this section shall, for the purposes of this section and unless a different intent clearly appears from the context, be construed as follows:

(a) "Blighted area" means any area, including a slum area, in which a majority of the structures are residential or in which there is a predominance of buildings or improvements, whether residential or nonresidential, and which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population: and overcrowding, environmental pollution or the existence of conditions which endanger life or property by fire and other causes, or any combination .of such factors, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime, and is detrimental to the public health, safety, morals or welfare.

***

(bm) "Environmental Pollution" has the meaning given in s.299.01(4)

***

(4) Power of cities.

(a) Every city is granted, in addition to its other powers, all powers necessary or convenient to carry out and effectuate the purposes and provisions of this section, including the following powers in addition to others herein granted:

***

3. Within its boundaries, to acquire by purchase, eminent domain or otherwise, any real or personal property or any interest therein, together with any improvements thereon, necessary or incidental to a redevelopment project; to hold, improve, clear or prepare for redevelopment any such property; to sell, lease, subdivide, retain for its own use, mortgage, or otherwise encumber or dispose of any such property or any interest therein; to enter into contracts with redevelopers of property containing covenants, restrictions, and conditions regarding the use of such property in accordance with a redevelopment plan and such other covenants, restrictions and conditions as ii may deem necessary to prevent a recurrence of blighted areas or to effectuate the purposes of this section; to make any of such covenants, restrictions, conditions or covenants running with the land, and to provide appropriate remedies for any breach thereof; within the boundaries of the city to enter into any buildings or property in any project area or any blighted property in order to make inspections, survey appraisals; soundings or test borings; environmental investigations and to obtain an order for this purpose from a court of competent jurisdiction, in the event entry is denied or resisted.

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66.431 Blight elimination and slum clearance.

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(2m) Definitions.

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(b) "Blighted area" means any of the following:

1. An area, including a slum area, in which there is a predominance of buildings or improvements, whether residential or non-residential, which by reason of dilapidation, deterioration, age, or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, environmental pollution or the existence of conditions which endanger life or property by fire other causes, or any combination of such factors is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, or crime, and is detrimental to public health, safety, morals or welfare.

2. An area which by reason of the presence of a substantial number of substandard, slum, deteriorated or deteriorating structures, predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility or usefulness, unsanitary or unsafe conditions, deterioration of site or other improvements, diversity of ownership, tax or special assessment delinquency exceeding the fair value of the

land, defective. or unusual conditions of title, environmental pollution or the existence of conditions which endanger life or property by fire arid other causes, or any combination of such factors, substantially impairs or arrests the sound growth of a city, retards the provision of housing accommodations or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare in its present condition and use.

3. An area which is predominantly open and which because of obsolete platting, diversity of ownership, deterioration of structures or of site improvements, environmental pollution or otherwise, substantially impairs or arrests the sound growth of the community.

(bm) "Blighted property" means any property within a city, whether residential **or** nonresidential, which by reason of dilapidation, deterioration, age or obsolescence, inadequate provisions for ventilation, light, air or sanitation, high density of population and overcrowding, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency or crime, and is detrimental to the public health, safety, morals or welfare, or any property which by reason of faulty lot layout in relation to size, adequacy, accessibility or usefulness, unsanitary or unsafe conditions, deterioration of site or other. improvements, diversity of ownership, tax or special assessment delinquency exceeding the fair market value of the land, defective or unusual conditions of title, environmental pollution or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs or arrests the sound growth of a city, retards the provisions of housing accommodations or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare in its present condition and use, or any property which is predominantly open and which because of obsolete platting, diversity of ownership, deterioration of structures or of site improvements, environmental pollution, or otherwise, substantially impairs or arrests the sound growth of the community.

***

(fm) "Environmental pollution" has the meaning given in s.299.01(4)

(5) Powers of Redevelopment Authorities.

(a)3. Within the boundaries of the city to acquire, purchase, lease, eminent domain, or otherwise, any real or personal property or any interest therein, together with any improvements thereon, necessary or incidental to a redevelopment or urban renewal project; to hold, improve, clear or prepare for redevelopment or urban renewal any such property; to sell, lease, subdivide, retain or make available for the city's use; to mortgage or otherwise encumber or dispose of any such property or any interest therein; to enter into contracts with redevelopers of property containing covenants, restrictions and conditions regarding the use of such property in accordance with a redevelopment or urban renewal plan, and such other covenants, restrictions and conditions as the authority deems necessary to prevent a recurrence of blighted areas or to effectuate the purpose of this sections to make any of such covenants, restrictions, conditions or covenants running with the land and to provide appropriate remedies for any breach thereof; to arrange or contract for the furnishings of services, privileges, works or facilities for, or in connection with a project; to temporarily operate and maintain real property acquired by it in a project area for or in connection with a project pending the disposition of the property for such uses and purposes as may be deemed desirable even though not in conformity with the redevelopment plan for the area; within the boundaries of the city to enter into any building or property in any project area or any blighted property in order to make inspections, surveys appraisals, soundings or test borings, environmental investigations and to. obtain an order for this purpose from a court of competent jurisdiction in the event entry is denied or resisted; to own and hold property and to insure or provide for the insurance of any real or personal property or any of its operations against any risks or hazards, including the power to pay premiums on any such insurance; to invest any project funds held in reserves or sinking funds or any such funds not required for immediate disbursement in property or securities in which savings banks may legally invest funds subject to their control: to redeem its bonds issued under this section at the redemption price established therein or to purchase such bonds at less than redemption price, all such bonds so redeemed or purchased to be canceled; to develop, test and report methods and techniques, and carry out demonstrations and other activities, for the prevention and elimination of slums and blight; and to disseminate blight elimination, slum clearance and urban renewal information.

66.46 Tax incremental law.

(1) Short Title. This section shall be known and may be cited as the "Tax increment Law".

(2) Definitions. In this section, unless a different intent clearly appears from the context:

(a) 1. 'Blighted area" means any of the following:

a. An area, including a slum area, in which the structures, buildings or improvements, which by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, <u>environmental pollution</u> or the existence of conditions which endanger life or property by fire and other causes, or any combination of these factors is conducive to ill health, transmission of disease, infant mortality. juvenile delinquency, or crime, and is detrimental to the public health, safety, morals or welfare.

b. An area which is predominantly open and which consists primarily of an abandoned highway corridor, as defined in s.66.431(2m)(a) or that consists of land upon which buildings or structures have been demolished and which because of obsolete platting, diversity of ownership,. deterioration of structures or of site improvements, <u>environmental pollution</u> or otherwise. substantially impairs or arrests the sound growth of the community.

2. "Blighted area" does not include predominantly open land area that has been developed only for agricultural purposes.

(am) "Environmental pollution" has the meaning given in s. 299.01(4).

Changes indicated by <u>underline</u>

Appendix C – Chapter 2 Comments/Information

The following general comments about the financial incentives part of this report were submitted by the Wisconsin Economic Development Association (WEDA): As you may know, the Wisconsin Economic Development Association ("WEDA") membership includes a unique mix of industry and government economic development professionals. Promoting brownfields redevelopment initiatives is a WEDA legislative priority for this upcoming session.

As a member of the Financial Incentives Subgroup to the Brownfields Study Group, worked with John Stibal and Jackie Jarvis in that WEDA closely crafting subgroup's recommendations to the Brownfields Study Group. *WEDA request your support for those recommendations being presented by that subgroup.*

While WEDA appreciates the fiscal challenges these ideas may present, we urge the Study Group make brownfields redevelopment a state priority by endorsing the full recommendations of the Financial Incentives Subgroup. The Commerce Brownfields Grant Program, for example, is an unqualified success and should be funded at those higher levels recommended by the subgroup. We must (and can) address the overall fiscal implications of these recommendations on the state budget. It is simply too early in the budget process, however, to compromise our ability to find creative ways to fund, those programs that advance everyone's goal of promoting brownfields redevelopment.

WEDA also acknowledges the dilemma facing the state in proposing to use "economic development" tools and funds for what traditionally was considered an environmental problem. This issue arose when considering a "non-jobs" component within the Brownfields Grant Program. WEDA asks the Study Group recognize that redevelopment of brownfields properties furthers important economic development objectives, regardless of a project's direct jobs-creation component. For example, establishing green space and recreational areas would often further a city's economic vitality. For this reason, we did not share the Department of Commerce's concern that a non-jobs component m the Brownfields Grant Program was inconsistent with the Department's mission. Despite our unqualified support of the Financial Incentives Subgroup's recommendations, adapting the Grant program for such projects should be further explored, particularly considering the ambiguity of the recommended alternatives (*i.e.,* use of stewardship funds).

Although WEDA was not a member of those subgroups investigating liability issues, WEDA does believe liability and related cleanup hurdles continue to limit our ability to redevelop brownfields properties. We would support related reform and are committed to work to that end with members of the Study Group.

WEDA appreciates the leadership and commitment made by John Stibal, Jackie Jarvis, and the entire Study Group to provide financial incentives for brownfields redevelopment. Thank you for your consideration, and please consider WEDA as a resource when advancing your ideas that promote economic redevelopment of brownfields.

Appendix D – Chapter 4 Comments/Information

State of Wisconsin MEMORANDUM/CORRESPONDENCE
Department of Health and Family Services
Division of Public Health
Bureau of Environmental Health
(608) 266-7480

Date:	October 22, 1998
From:	Lynda Knobeloch, PhD. Mark Werner, PhD.
To:	Bill Ramsey, DNR
Subject:	Comments on Draft Recommendation for the Use of Natural Attenuation in Area-Wide Groundwater Cleanup Efforts

We have reviewed the recommendation on natural attenuation submitted to the Brownfields Task Force subgroup on area-wide groundwater cleanup approaches (of which Dr. Werner is a member). This recommendation proposes several changes in the requirements that are set forth in NR 726. Specifically, its authors suggest that criteria 3 and 4 which require that the PAL not be exceeded off-site, and that groundwater use restrictions must be filed with the registrar of deeds for exceedances of the ES, limit use of Natural Attenuation as a remedial option. In addition, the authors argue that if the groundwater is not used as a drinking water source, public health issues can be disregarded - presumably because there is no potential for exposure.

We disagree with this position and would like to offer the following perspectives. Over the past decade, our office has dealt with many cases in which contaminated groundwater has transported toxic chemicals several hundred feet from the original source toward residences, schools, hospitals, and businesses. When contaminant plumes reach these structures, toxic chemicals can seep into the buildings through cracks in the foundations or through sewer lines and pose a threat to the health of building occupants. Specific examples of this problem have been seen throughout the state. We are currently dealing with a large apartment complex in Milwaukee where tetra- and trichloroethylene were detected in air samples collected from two units. The source of these volatile chemicals was an industrial landfill located on an adjacent property. In the past, our staff has inspected homes near old chrome plating shops that had yellow crystals of chromium salts on basement walls. We frequently find gasoline vapors and vinyl chloride in the basements of homes that are impacted by plumes of contaminated groundwater. All of these situations pose a high exposure risk to occupants and require immediate intervention measures such as relocation of the affected families or soil excavation accompanied by ventilation of the homes. In addition to threatening nearby residential concerns, contaminated groundwater sometimes discharges to surface streams, rivers, or wetlands. Contamination of these water bodies can pose a threat to amphibians, fish, birds, and other wildlife. To protect against these problems, we believe that contaminated groundwater should be cleaned up in a timely fashion regardless of its use as a public or private drinking water supply.

We also disagree with the author's contention that a "reasonable period of time" should be defined as a period not to exceed 100 years. We agree that "reasonable period of time" is too subjective to provide regulators with meaningful guidance. However, we believe that natural attenuation should be considered as an option only in situations where contamination levels are low, the zone of contaminants is small, and there is no potential for exceedances of the PAL beyond the property boundary. In these cases it would seem likely that natural attenuation would occur in a short period of time - perhaps over a year or two.

Thank you for providing us with the opportunity to comment on this proposal.

MEMO TO: Brownfields Study committee

FROM: Caryl Terrell, Legislative Coordinator, John Muir Chapter-Sierra Club 222
S. Hamilton St #1, Madison WI 53703-3201
cterrell@execpc.com 608-256-0565
DATE: October 29,1998
RE: Comment on WMC proposal to substitute municipal well ordinances for deed restrictions on property with groundwater contamination.

The WMC proposal is not new. It has been discussed and rejected by other administrative rules advisory committees, DNR staff and the Natural Resources Board.

A. Here are some observations about why this proposal should again be rejected.
1. Deed restrictions are the most specific to the parcel, accurate, available and likely to be searched source of information for affected parties, whether they are neighboring property owners, prospective buyers, mortgage holders, etc. Without a deed restriction there is no oversight of the use of the future use of the property nor any warning of potential exposure to contaminants if the property is disturbed. Without a deed restriction, there is no documentation that the previous owner legally dealt with the parcel's contamination and properly handled and disposed of wastes at the site. This could initiate another round of involvement with the DNR and the court system over liability. Without documentation that the property can be redeveloped, the parcel is not only "stigmatized" (as some on the committee have claimed) but also unmarketable.

2. Substituting municipal institutional control has several immediate disadvantages.
a. It shifts responsibility for the accuracy and maintenance of the information from the most affected party (the property owner) to the collective government representing every municipal resident and every parcel of land.
b. It is unclear how the municipality will store the information but this information is likely to becomes less specific to the parcel, more generalized, less available and less likely to be consulted by potentially affected parties.

B. The proposal also implies that the residual groundwater contamination is no longer of public concern. Clearly this is untrue, otherwise a closure letter would have been issued. Here are some observations about groundwater concerns, especially in urban areas.

1. The safety of drinking water supplies is a serious problem. A 1994 Times Mirror poll shows that seven in eight Americans are concerned about their drinking water. For good reason. Treated public drinking water is not always safe to drink. One-half or 116 million Americans drink from water systems that violate EPA standards and rules. The Centers for Disease Control and Prevention estimate that 900 die each year and almost a million are sickened, causing great hardship and the loss of billions of dollars in lost life and productive work.

2. The Sierra Club believes that pollution prevention is the most cost effective way for communities to protect their drinking water supplies and other water resources.
a. Public drinking water supplies should not make people sick or contribute to their death. US EPA does not have a complete set of drinking water standards for the many pollutants found in drinking water. Known sources of contamination are often unregulated. Communities have limited legal and technical tools and money to protect their drinking water supplies. We should be helping these communities in every way possible to make it safe to drink water from the tap in any Wisconsin community.

b. I have attached an article summarizing the 115-page report of The Urban Land Institute, Assessing the Experience of Local Groundwater Protection Programs, listing 68 distinct methods being used by localities to protect groundwater. (editors note: this attachment is not included, but can be obtained upon request from R&R staff) "The report concludes that a sound ground water protection program must include at least some police/regulatory powers, such as zoning ordinances, operating standards, etc. These types of powers should be complemented with 'softer' methods such as public education, water conservation, household hazardous waste collection and similar types of non-regulatory activities." (p. 5 "Study of Local Programs Uncovers Nearly 70 Different Ways to Protect Groundwater" in Ground Water Bulletin, Summer 1994, p.4–5).

c. The ability of municipalities to effectively use these tools will vary with the training and knowledge of staff and the resources for enforcement. An example is the lack of enforcement of well abandonment ordinances.

3. In only a few areas of the state has our groundwater resource been intensively studied. Without site-specific information, it is unwise to make generalizations about the isolation of one aquifer from other aquifers.

a. For example, only after considerable research are hydrogeologists now able to state that the confining unit (separating the upper and lower aquifers) is largely absent in the Madison lakes area and eastern portion of Dane County (p. 24 and 26, Evaluation of Alternative Management Strategies, one of the technical reports of the Dane County Regional Hydrological Study August 1997 completed by the US Geological Survey and the Wisconsin Geological and Natural History Survey). Using an opposite assumption, planners and water utility managers have until recently been less concerned about potential drinking water supply impacts of waste sites and brownfields in these areas of the county.

b. Does the WMC proposal include support for in-depth groundwater hydrogeologic studies to verify the "isolation" of a particular aquifer? I don't find this in their proposal.

4. Most Wisconsin communities are growing and spreading over currently undeveloped land. One cannot assume that any aquifer in the state will not be needed for future human use.

5. Use of urban aquifers is subject to change. For instance, several communities (Milwaukee and surrounding cities, Green Bay and surrounding cities, Madison and surrounding cities) are studying combining surface and groundwater to deal with regional drinking water quality and quantity problems as well as new uses for exhausted aquifers, such as storage (see Fifth Annual Wisconsin Water Law conference proceedings, particularly paper by Lawrie Kobza). The issue would be further complicated where groundwater contamination is left untreated.

6. Environmental impacts of groundwater contamination must also be considered. Surface and groundwater resources are interconnected. Movement of contaminants from one to the other are often influences by municipal groundwater pumping. For instance, Madison area water utilities are considering recommendations that they coordinate pumping strategies to reverse the historic adverse, impacts of over-pumping and cones of depression on lakes, low-flow regimes of rivers and streams, artesian wells, natural springs and wetlands. (See Dane County Regional Hydrological Study.)

C. How does the WMC proposal contribute to a Brownfields Redevelopment Strategy?

I also confess to being baffled by such an anti-economic redevelopment and anti-property value proposal. What we lose is a single property identified as a source of continuing groundwater contamination with a responsible party maintaining oversight and available, in deed, responsible to monitor trends and act immediately if the contamination increases or moves off-site. In its place, the municipality will have to identify the unclosed site as a potential continuing source of contamination and, without the ability to receive updated information over time, will conservatively delineate the site and surrounding area as a pollution source to its drinking water supplies.

This information will be published, under US EPA's Drinking Water Right to Know rules. Presumably, diligent real estate agents and prospective developers will learn that a large area is contaminated and not being dealt with. This is directly counter to the Brownfields Redevelopment strategy.

Please reject the WMC proposal to substitute municipal well ordinances for deed restrictions on property with groundwater contamination.

State of Wisconsin MEMORANDUM/CORRESPONDENCE

DATE: October 27, 1998 FILE REF: 3230
TO: Bill Ramsey, DNR - RR/3
FROM: Mike Lemcke, DNR – DG/2
SUBJECT: Area-wide Groundwater Cleanup Approaches Subgroup - Draft Issues Report

Thank you for the opportunity to participate in and provide comment on the area-wide groundwater cleanup approaches subgroup-draft issues report. The report does a good job of discussing some of the barriers and difficulties that encompass multiple party cleanups.

On reflecting back at our last subcommittee meeting it became clear to me that the proposal described in attachment A for the Sustainable Urban Development Zone (SUDZs) will undoubtedly be a great product of this subcommittee. Additional fine tuning to the SUDZ concept needs to identify a strong emphasis on groundwater clean-up, not just on agreements and funding. There needs to be a strong commitment to clean up groundwater and to educate and communicate with responsible parties, lenders and realtors and the time and cost savings when multiple parties work together.

The other issues that were initially developed are also very good in defining both the problems that we are trying to solve and potential solutions to each problem/issue.

However in my opinion Attachment B is outside of the scope of this subcommittee or committee and does not identify any problem that it is trying to fix. I believe attachment B does little to further discussion or provide solutions on how best to clean-up groundwater on an area-wide basis. Eliminating groundwater use restrictions and being liberal in what constitutes a "reasonable time" for cleanup does little to effectuate groundwater cleanups. The factors listed under s.NR 722.07(4)(a) already provide much latitude in determining cleanup time frames. The use, and potential use, of groundwater is already a factor considered when determining cleanup time frames (see s.NR 722.07(4)(a)4.) and is a factor used in determining the type and aggressiveness of remedies required. For example, if contaminated groundwater is non-potable, the cleanup time frame is typically long and less aggressive, long-term remedies, such as natural attenuation, are considered. Further, if multiple properties work together in developing a cleanup time frame on an area-wide basis (where appropriate), rather than on a site-specific basis, time, cost and effort will be reduced. Therefore I do not believe the subcommittee should forward attachment B on to the committee of the whole. If we do forward Attachment B to the committee at a minimum the following disclaimers should be attached to it. 1) B is outside of the scope of the committee, 2) there were many subcommittee members who did not support its concepts, 3) it does not identify any problem that it is supposed to fix, and 4) it will provide confusion to this effort rather than clarity.
Shifting gears, somewhere in the overall report, providing that it fits within the Charge of the larger

committee, the report should address ways and means to cleanup groundwater and maximize efficiencies on an area-wide basis discussing the benefits of shared resources of an area wide clean up. For example an entire industrial corridor could join forces to monopolize on economies of scale, reduce duplication, and simplify the process for all parties involved. If multiple parties coordinate and cooperate, everything from site investigations, monitoring wells, remedial actions, capitol costs, O&M costs, reports, reviews, consultants, attorneys, regulatory activities, etc., can be reduced and optimized to save time, cost and effort. Drilling activities, laboratory services, equipment purchases, sampling activities, etc., could be bundled and coordinated to further maximize efficiencies. The benefits of cooperation and shared resources need to be clearly articulated to all parties involved.

If you have any questions on my comments let me know.

State of Wisconsin MEMORANDUM/CORRESPONDENCE

DATE: July 17, 1997
TO: Natural Resources Board
FROM: George E. Meyer, Secretary
SUBJECT: Follow-up on NR 726.05 Closure Flexibility Rule Issues

When the rule revisions to NR 140 and NR 726.05(2)(b) were approved in June of 1996, the Natural Resources Board requested that we report back within a year on the Department's findings regarding two issues brought up by the Wisconsin Manufacturers and Commerce (WMC) during the public comments portion of the board meeting on the proposed rule.

The first issue raised was whether the Closure Flexibility rule, s.NR 726.05(2)(b), Wis. Adm. Code, which relies on natural attenuation as a remedy for groundwater after a groundwater use restriction has been recorded, should be made applicable to landfills. The second issue is over the NR 726.05(2)(b)4. rule requirement that a groundwater use restriction be recorded for a site with an NR 140 groundwater enforcement standard exceedance, where natural attenuation is the final remedy, when the site is proposed to be closed out. The question is whether existing municipal ordinances, with requirements for well permitting and abandonment, would offer the same level of protection to human health and the environment and, provide adequate public notice for prospective purchasers, lenders, etc., in lieu of recording groundwater use restrictions in cases where such ordinances exist.

ISSUE 1: NATURAL ATTENUATION AND LANDFILL REMEDIATION

WMC representative's interest is for responsible parties to have the option to apply for "flexible" or "conditional closure", relying on natural attenuation to complete groundwater remediation, at landfills. Although Ch. NR 726 is generally applicable to remedial actions conducted at landfills, the close out criteria in s.NR 726.05(2)(b) specifically excludes landfills. That portion of the rule (the "flexible closure" provision) only applies to hazardous substance spill cases. Landfills were excluded from the "flexible closure" provision primarily because of concerns relating to waste heterogeneity, variability in the rate of release of contaminants, and the presence of contaminants resistant to natural attenuation. Landfills also have an on-going legal responsibility for long-term care. Natural attenuation is currently a remedial option under NR 140 for any site with groundwater contamination including landfills causing contamination. It is important to distinguish that remedy selection and case closure are two separate issues with regard to landfills.

Attachment 1 is a memo dated February 10, 1997, from the Bureau of Waste Management (WA) to Mark F. Giesfeldt, Director of the Bureau For Remediation and Redevelopment, which describes the basis of remedial action decision making at landfills. The list of landfill sites is included as an example of remedies selected based on site specific needs for soil and groundwater contamination which ensure protection of human health and the environment. As you'll note, remedial actions at some sites include long-term groundwater monitoring as part of the remedy.

Both RR and WA staff will consider selection of natural attenuation monitoring at landfills as part of an overall remedial package as long as the site meets the remedy selection criteria in NR 722.07 regarding protection of human health and the environment and the groundwater protection criteria of NR 140.

The Milwaukee Brownfields forum also reviewed the February 10, 1997 WA memo on landfill remedial approaches and asked about remediation of contamination sites, such as gas stations that have petroleum contamination and foundry sand or generator ash which was used to grade the site. Staff have recommended that remedial planning and cleanup for this type of site could best be handled by the NR 700 process in order to prevent duplication between NR 500 and NR 700 and to ensure the redevelopment of this type of waste site. We will continue to consider close out of this type of contamination site where a complete investigation is conducted and the type of waste is characterized as uniform and addressed as part of the final remedy.

The RR staff will continue to work with the groups such as the Milwaukee Brownfields Forum to address issues related to redevelopment of contaminated sites by providing specific examples and making recommendations. Furthermore, the NR 700 Focus Group will continue to act as a statewide forum to discuss remediation issues, needs and solutions.

ISSUE 2: USE OF EXISTING MUNICIPAL WELL ORDINANCES IN LIEU OF GROUNDWATER USE RESTRICTION.

With regard to the well ordinance and groundwater use restriction issue, WMC clarified their idea that if the ordinances were enforced, the public would be adequately protected from contaminated private water supplies. RR program staff worked with the Drinking Water and Groundwater Program staff to develop a survey of DNR Water Supply engineers on municipal ordinance information. The results of the survey (attachment 2) indicate that 90% of the 484 municipal water supply systems reported on in the survey (out of 605 systems in the state) have well abandonment/ permit ordinances which are modeled after the DNR model ordinance. Forty-four of the municipal systems have not yet adopted an ordinance. Forty are classified as small (i.e., serve < 3300 persons), 1 is medium (i.e., serve 3301 - 50,000 persons), and 3 are large (i.e., serve > 50,000). The ordinances require that noncomplying wells be abandoned and that private wells be disconnected when a municipal system is online. The ordinances do not prohibit the continued use of disconnected wells or the installation of new wells. In many cases wells are permitted after they are installed.

The responses to the question of how and where well records are kept indicated that there is little uniformity between municipalities on how private water supply well permit or abandonment records are kept. Furthermore, comments on the survey indicated that these ordinances serve as a tool for groundwater protection when and if they are enforced. Enforcement is not uniform and is lacking in some locations.

As a result of information in this survey, particularly the current limitations on the authority of municipalities to prevent installation of (or require abandonment of) water supply wells and the inconsistent level of enforcement of existing well permit/abandonment ordinances, the Department's recommendation is that no change be made to the NR 726.05.(2)(b) (Closure Flexibility) rule requirement to file a groundwater use restriction on the property deed. In the future, as a result of the budget deliberations by the Legislature's Joint Finance Committee on Finance's biennial budget bill, the Department has been directed to work with external experts, to study area-wide groundwater contamination and remedial approaches municipalities and voluntary parties might take.

Please let me know if you have questions or suggestions to better define these important cleanup issues.
2 attachments
Memo to M. Giesfeldt re: Landfill Remediation (editors note: this attachment is not included).
Drinking Water and Groundwater (formerly Water Supply) Program Survey
cc: Mark Giesfeldt, RR/3
Paul Didier, WA/3
Bob Krill, DG/2

State of Wisconsin MEMORANDUM/CORRESPONDENCE

Date: December 9, 1996
To: Sally Kefer, DNR RR/3
Lee Boushon, DNR DG/2
From: Sharon Schaver, DNR, Southeast - Hydrogeologist
Subject: Well Abandonment / Permit Ordinance Survey Results

On November 14, 1996, thirteen of the eighteen regionally-based, public water supply engineers completed the attached survey during a regularly scheduled statewide meeting held in Onalaska, Wisconsin. In addition to the following summary and figures, a detailed question and answer section is included for your use. (editor's note: the detailed question and answer section is irreproducible and not included in this report, a copy may be obtained upon request from R&R program staff)

Summary and Figures

Question 1 asked about the individual's assigned location; the survey found that a statewide distribution is represented by the survey respondents. [See Figure 1.]

Question 2 asked about the number of surface water and groundwater systems regulated by the respondent; the survey found that the respondents are directly responsible for regulation of eighty-one percent of the 605 active municipal systems throughout the State of Wisconsin.

Question 3 asked that the respondents estimate the number of systems they regulate in one of three population ranges; the survey found that about 73% are small and serve less than 3300 persons, about 24 % are medium and serve between 3301 and 50,000 persons, and about 3 % are large and serve greater than 50,000 persons. [Figure 8.]

Question 4 asked that for each population range the respondents identify (or estimate) the number of systems that have adopted a well abandonment/permit ordinance; the survey found that about 90 percent of systems regulated by the respondents have a well abandonment / permit ordinance. Forty (40) of 357 small-size systems reportedly do not have abandonment ordinances and four (4) of 119 medium-size systems do not have abandonment ordinances. All large-size systems regulated by the respondents have abandonment ordinances. [Figures 3, 4, *5*, 6, and 7.]

Question 5 was a three-part question that asked the following:

a. Do the ordinances include a permitting program as required by code?
b. Is the permitting program active?
c. How and where are records kept?

The detailed response to question 5 is in the Question and Answer section of this report.

Briefly, ten (10) of thirteen (13) respondents responded that a well permitting program was included as required by code; three respondents indicated that “some”, “very few do”, or “most do” include a well permitting program. (Figure 9.)

Six of 13 surveys indicated the well permitting programs were active, no answer was given on one survey, two (2) surveys indicated that “some” or “1/2” the systems were active or beginning to implement (a program), “not always”, “a small percentage” or “very few do”, and “merely on paper” were the responses on the remaining four surveys. [Figure 10.]

Eleven surveys indicated that well permitting records are kept in slightly different locations (City hall in a file folder, Village/city clerk/ or utility office, municipal office, sanitary district office, Plumbing or Building Inspectors) and sometimes aren’t kept at all or the respondent wasn’t sure of where or how records are kept.

Question 6 asked whether the respondent could create or easily get an estimated number of unabandoned wells in their area of responsibility; four (4) responded that they could; seven (7) responded that they could, but then qualified the “yes” response; and, two (2) said they could not create or easily estimate the number of unabandoned wells. Their comments are detailed in the Q & A section of this report.

Question 7 asked for a judgment about whether system managers / operators use their well abandonment / permit programs as an important tool for groundwater protection. Three individuals responded that managers and operators use their programs as an important tool for groundwater protection, three respondents said that the programs weren’t used as an important tool, no answer was given on one survey, and six responded that “some do”, “a few do”, “most do not”, etc. Their comments and responses are detailed in the Q &A section of this report.

Question 8 asked whether the well abandonment / permit program is an important tool for groundwater protection in their area. Six responded “yes”, one responded “no”, five had other responses and/or examples, and no answer was given on one survey. Of the “other” responses, one common theme was that enforcement (e.g. making facilities implement and administer the program) was a key element in the success of the program. Additionally, respondents to questions 7 and 8 indicated that their facilities often view the well abandonment ordinance / permit program as yet another regulatory burden. [Figure 13.]

Question 9 asked whether they knew of any groundwater contamination cases where unabandoned wells were suspected or documented contributors to the contamination. Four responded “yes”, eight responded “no”, and no answer was given on one survey. Their comments are detailed in the Q & A section. [Figure 14.]

Question 10 asked whether they knew of any cases where an unabandoned, contaminated (chemically or bacteriologically) private well had been discovered because of a well abandonment / permit program. Five responded “yes”, seven responded “no”, and one response explained the criteria for requiring well abandonment. Additional comments are detailed in the Q & A section. (Figure 15.]

Question 11 asked whether the well abandonment / permit programs for any of their systems had included a requirement for chemical analysis (VOC or other). Two individuals responded “yes” and eleven responded “no”. Examples are detailed in the Q & A section. (Figure 16.]

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